AUG 10 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ...71-206

C. R. GROVE, TRUSTEE, et al.

v.

DUN & BRADSTREET, INC.,
Petitioner.

Petition of Dun & Bradstreet, Inc., for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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Petition of Dun & Bradstreet, Inc., for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Dun & Bradstreet, Inc., appellee in the Court below and defendant in the District Court (hereinafter the "defendant"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on February 8, 1971, reversing decisions of the United States District Court for the Western District of Pennsylvania entered February 4, 1970, and July 16, 1968, and to also review a prior judgment of the Court of Appeals entered in the same case on September 8, 1966, reversing decisions of the District Court entered on May 14 and October 27, 1965.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania of May 14, 1965, (R. 1a)* that held that the publication in issue was not libelous per se is reported at 37 F.R.D. 460.

The opinion of the District Court of October 27, 1965, (R. 11a) that denied plaintiff's motion for new trial following a grant of directed verdict for defendant is reported at 246 F. Supp. 419.

The opinion of the United States Court of Appeals for the Third Circuit of September 8, 1966, (R. 22a) reversing the District Court and remanding the case for a new trial is reported at 367 F. 2d 625.

The opinion of the District Court of July 16, 1968, (R. 36a) setting aside a verdict for plaintiffs and granting defendant's motion for a new trial while denying its motion for judgment N.O.V. is reported at 286 F. Supp. 899.

The opinion of the District Court of February 4, 1970, (R. 69a) granting defendant's motion for judgment N.O.V. is reported at 308 F. Supp. 1068.

The opinion of the Court of Appeals of February 8, 1971, as modified March 15, 1971, (R. 77a) reversing the District Court is reported at 438 F. 2d 433.

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* References designated by "R." are to pages of the Appendix filed herewith.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on February 8, 1971, (R. 94a), and orders were entered on March 15, 1971, both denying the petition for rehearing (R. 95a) and amending the opinion of February 8, 1971 (R. 96a). This Court by its order of June 9, 1971, extended the time in which to file this petition until August 12, 1971. A review of the February 8, 1971, judgment will necessarily entail a review of a prior judgment of the Court of Appeals in this case entered September 8, 1966. (R. 22a) The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

In a libel case against a credit reporting agency which furnishes credit information to subscribers at their request on a business in which said subscribers are interested, should not a judgment for presumed damages be reversed as violative of the First and Fourteenth Amendments of the United States Constitution where the jury in its verdict specifically found that plaintiff suffered no special damages?

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the U. S. Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment of the U. S. Constitution provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On January 9, 1963, defendant, a credit reporting agency that issues credit reports on various businesses to only those of its subscribers who request information on the business in which they are interested, issued a credit report on plaintiff, Altoona Clay Products, Inc., to 15 of its subscribers, all of whom had inquired about plaintiff. (299a-301a)* Included in the report (Exhibit 22, a copy of which is reproduced in the Appendix at R. 103a) was a statement that a judgment had been entered. While a judgment had been entered against a company called Brick and Tile Sales Co., Inc., formerly known as Altoona Clay Products Company, Inc., and had been indexed under both of those names in the court records, there actually was no judgment against Altoona Clay Products, Inc., a corporation that had been formed to succeed to the business of Brick and Tile Sales, formerly known as Altoona Clay Products Company, Inc. (817a-18a)

Plaintiff sued defendant in the United States District Court of the Western District of Pennsylvania

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* References to numbers followed by "a" (with no "R." preceding) designate pages of the record as filed in the Court of Appeals. The Clerk of that Court has certified the record pursuant to Supreme Court Rule 21 and has transmitted it to defendant's counsel. The record, as certified, includes the judgments and opinions of the Court of Appeals, pertinent parts of the transcript of testimony in the District Court, pertinent exhibits, the briefs filed with the Court of Appeals, and the petition for rehearing. If any member of the Supreme Court desires to examine any part of the record for purposes of this petition, or if requested by respondent, the record shall be immediately transmitted to the Clerk.

under the libel laws of Pennsylvania, claiming diversity jurisdiction and alleging that the false report of the judgment had injured its credit. Prior to trial defendant moved for summary judgment on the ground that the erroneous report of a judgment did not constitute a libel per se and that, since special damage had not been pleaded, the complaint did not state a cause of action. The District Court denied the motion, ruling that the report was not libelous per se but that plaintiff should be permitted to prove its special damages, if any. 37 F.R.D. at 464 (R. 8a-9a)

Plaintiff proceeded to trial and failed to prove special damages. The District Court then directed a verdict for defendant. From the District Court's denial of a motion for new trial, 246 F. Supp. 419 (R. 11a), plaintiff appealed, and the Court of Appeals for the Third Circuit, 367 F. 2d at 630-31 (R. 31a), reversed the District Court, holding that as a matter of law the credit report imputed insolvency and was therefore defamatory on its face. The case was remanded for a new trial with the direction that the only issues left for consideration were defendant's alleged negligence and damages. *Id.* at 632 (R. 34a-35a).

At the second trial the District Court charged the jury in accordance with the law of the case as stated by the Court of Appeals, i.e., that the report was defamatory as a matter of law. (1368a). After also being charged that it could find for the plaintiff if it found want of reasonable care or negligence (1371a-75a), the jury returned a general verdict in favor of the plaintiff for $110,000. In addition, the jury returned a verdict for defendant finding that plaintiff had suffered

no special damages. (1382a, 1404a, 286 F. Supp. at 901, R. 37a).

The District Court granted defendant's motion for a new trial although it denied its motion for judgment N.O.V. The exhaustive opinion of the District Court, 286 F. Supp. 899 (R. 36a), which reviewed at length the uncontradicted facts appearing in the evidence, set forth a number of reasons for granting a new trial, among which was the fact that the verdict was grossly excessive.

Prior to the commencement of the new trial that had been ordered by the District Court, that Court, in light of the direction that the law had taken with respect to First Amendment rights accorded to communications concerning public figures or matters of public interest, reconsidered its ruling on defendant's motion for judgment N.O.V. and awarded judgment to defendant, conditionally granting a new trial to defendant in the event that the District Court was overruled by the Third Circuit on the First Amendment issue. 308 F. Supp. 1068 (R. 69a).

Plaintiff again appealed, and again the Court of Appeals reversed the District Court, 438 F. 2d 433 (R. 77a), holding that communication of information by way of credit reports does not warrant First Amendment guarantees. Id. at 438 (R. 86a-87a). The Court likewise reversed the conditional grant of a new trial and remanded the case for entry of judgment in accordance with the jury's verdict, saying that all the issues, other than negligence and damages, had been disposed of by the Court of Appeals' prior decision. *Id.* at 438-39, nn. 6, 7 (R. 88a-89a).

Because of the substantial federal question involved, arising from an infringement of its rights under the First and Fourteenth Amendments, defendant has filed this Petition.

In early January, 1963, one of defendant's subscribers, which was a supplier of plaintiff, asked defendant for its latest credit information on plaintiff. (1034a-40a) Defendant's district office in Pittsburgh directed the inquiry to one of its field investigators located in plaintiff's area. The investigator visited the courthouse in Blair County, Pennsylvania, and obtained what information he could on plaintiff, which he remembered just as "Altoona Clay Products." (1129a) After finding certain information filed under secured transactions (1134a) and indexed in such a way as to interchangeably use the designations, "Co." and "Inc." with respect to the same entity (Exhibits X-1, X-2, 206-07a), he then located the name Altoona Clay Products Company in the judgment docket index (Exhibit V, 204a) and saw an unsatisfied judgment. Believing this to be pertinent, he copied it just as it appeared on the index page (1139a) and transmitted the information back to the district office in Pittsburgh, but only after calling on plaintiff's office to verify the information, where he found the company's officers to be absent and was refused any information by the office secretary. (126a, 1149a)

Upon receiving the information, the district office incorporated it into a report which was mailed out on January 9. The only recipients of the report, other than the one supplier who made the specific inquiry initiating the investigation, were 14 other subscribers which

pursuant to their contracts, had inquired on plaintiff within the previous 12 months. (299a-301a)

On April 11, 1963 (1008a), defendant first learned that it had probably made an error. The courthouse records were immediately rechecked* and defendant's office in Harrisburg was contacted by wire to examine plaintiff's corporate history in the Department of State. (1011a-12a) On the next business day a correction notice (Exhibit 23) went out to each subscriber to whom the erroneous report had been sent. (160a)

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*When the court records were rechecked the investigator still said he was confused as to the identity of the two companies. (1141a, 1147a) In fact, others were confused, viz. plaintiff's treasurer (Exhibits 30 and P), plaintiff's attorney (1241a), the president of the local bank (1152a, 1154a), plaintiff's suppliers (132a). Indeed much of the confusion had been caused by plaintiff's own president who over the years had signed legal documents bearing the "wrong" name. (175a, 177a, 183a, 185a, 189a)

REASONS FOR ALLOWANCE OF THE WRIT

The Court of Appeals held that in an action for libel plaintiff was entitled to recover general damages despite the express finding of the jury that no special or actual damages were suffered.

This petition for a writ of certiorari should be granted because a majority of the members of this Court has recently stated the belief that such recovery would violate the rights of a defendant under the First and Fourteenth Amendments.

ARGUMENT IN SUPPORT OF REASONS

The Jury Having Expressly Found No Special Damages to Exist, the Award of General Damages Violated Defendant's Rights Under the First and Fourteenth Amendments.

Two months ago, shortly after the opinion of the Court of Appeals for the Third Circuit in this case was filed, this Court rendered its judgment affirming that same Circuit in *Rosenbloom v. Metromedia, Inc.*, 91 S.Ct. 1811 (1971).

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the rule was first announced that the constitutional guarantees of freedom of speech and of the press require clear and convincing proof of knowledge of falsity or reckless disregard for the truth in order to establish liability for an alleged libel of a public official by a publisher. In *Rosenbloom*, this Court applied that protection to "all discussion and communication involving matters of public or general concern." 91 S.Ct. at 1820.

Defendant argued below that the report in question was entitled to the protection of the First and Fourteenth Amendments and urged the Court of Appeals for the Third Circuit to follow its holding in *Rosenbloom*. Although defendant still firmly believes that the report does concern a matter of public or general interest, the various opinions of the members of this Court in *Rosenbloom* now make it clear that the decision below violates an overriding First Amendment right of defendant, making it unnecessary for the Court to reach the question whether the report involves a matter of public interest. From these opinions it appears that,

for the first time, a majority of the members of this Court have expressed their view that the First Amendment should at the very least prevent recovery in *any* private libel action unless there is proof of special (i.e., actual) damages. As stated above, such damages were expressly found *not* to exist by the jury below, and neither defendant nor plaintiff disputed this finding.

Mr. Justice White, in his concurring opinion in *Rosenbloom,* supra at 1827, analyzed the views of the members of the Court:

> "Given this spectrum of proposed restrictions on state defamation laws and assuming that Mr. Justice Black and Mr. Justice Douglas will continue in future cases to support the severest of the restrictions, *it would seem that at least five members of the Court would support each of the following rules:*
>
> "For public officers and public figures to recover for damage to their reputations for libelous falsehoods, they must prove either knowing or reckless disregard of the truth. All other plaintiffs must prove at least negligent falsehood, but if the publication about them was in an area of legitimate public interest, then they too must prove deliberate or reckless error. *In all actions for libel or slander, actual damages must be proved, and awards of punitive damages will be strictly limited."* (Emphasis added)

In his dissenting opinion, Mr. Justice Harlan agreed with this position, stating at 1829-30:

> "I, too, think that, when dealing with private libel, the States should be free to define for themselves

the applicable standard of care so long as they do not impose liability without fault; that *a showing of actual damage should be a requisite to recovery for libel;* and that it is impermissible, given the substantial constitutional values involved, to fail to confine the amount of jury verdicts in such cases within any ascertainable limits." (Emphasis added)

Mr. Justice Harlan further stated at 1831:

"Given the defense of truth, it is my judgment that, in order to assure that it promotes purposes consistent with First Amendment values, the legitimate function of libel law must be understood as that of compensating individuals for actual, measurable harm caused by the conduct of others."

Mr. Justice Marshall, with whom Mr. Justice Stewart joined, stated in his dissenting opinion at 1839-40:

"In addition to the huge awards that may be given under the label of punitive or exemplary damages, other doctrines in the law of defamation allow substantial damages without even an offer of evidence that there was actually injury. (See Montgomery v. Dennison, 363 Pa. 255, 69 A. 2d 520 (1949); Restatement of Torts §621 (1938). These doctrines create a legal presumption that substantial injuries "normally flow" from defamation. There is no requirement that there be even an offer of proof that there was in fact financial loss, physical or emotional suffering, or that the plaintiff's standing in the community was diminished. The effect is to give juries essentially unlimited discretion

and thus give the jury much the same power they exercise under the labels of punitive or exemplary damages. The impingement upon free speech is the same no matter what label is attached."

* * * * * * *

"The threats to society's interest in freedom of the press that are involved in punitive and presumed damages can largely be eliminated by restricting the award of damages to proven, actual injuries. The jury's wide ranging discretion will largely be eliminated since the award will be based on essentially objective, discernable factors. And the self-censorship that results from the uncertainty created by the discretion as well as the self-censorship resulting from the fear of large judgments themselves would be reduced. At the same time society's interest in protecting individuals from defamation will still be fostered. The victims of the defamation will be compensated for their real injuries. They will not be, however, assuaged far beyond their wounds. *And, there will be a substantial although imprecise and imperfect admonition to avoid future defamation by imposing the requirement that there be compensation for actual damages."* (Emphasis added)

In none of the five opinions filed in *Rosenbloom* did any of the Justices express the view that a minimum constitutional standard of proof of actual damages would be inappropriate; rather, some of the Justices believed that the communication involved in *Rosenbloom* involved a matter of public or general interest and warranted a *higher* degree of protection —

that announced in *New York Times Co. v. Sullivan*, supra — while Mr. Justice White said that the Court need not go beyond holding that the First Amendment applied because the comment concerned the official acts of a public servant.

In the portion of his opinion quoted above, Mr. Justice Marshall noted that juries are allowed to speculate what damages may "normally flow" from a libel and that this "essentially unlimited discretion" gives the jury "much the same power they exercise under the labels of punitive or exemplary damages."

The present case offers a classic instance of a jury being permitted to punish a publisher for simple negligence in spite of the fact that actual damages were found not to have been suffered.

On the first appeal below, the Court of Appeals remanded "for a jury determination of whether defendant's agent was negligent in his investigation", 438 F.2d at 439 n.6 (R. 88a), 367 F.2d at 632 (R. 34a), the Court noting (and the jury subsequently being charged) that "want of reasonable care and diligence to ascertain the truth, before giving currency to an untrue communication" would result in liability. *Id.* The jury was also charged that it could award general damages for "the general pecuniary harm which would normally result from such a publication." 438 F.2d at 440 (R. 92a)

The District Court gave a standard form of charge with respect to special damages, explaining that they "cover a specific item of loss suffered by the plaintiff", that "it rests upon the plaintiff to prove these items with reasonable certainty", and that "[r]easonable certainty does not require strict proof and the plaintiff

should not be barred from such recovery by the difficulty of making accurate determination." (R. 99a; that portion of the Court's charge defining and explaining general and special damages is set forth in the Appendix, R. 98a-101a). The Court went on to tell the jury that specific loss of sales (and thus profits) was one example of special damages. (R. 100a).

Despite the fact that the District Court found the award of $110,000 general damages so excessive that it conditionally granted a new trial should it be reversed on the constitutional question, the Court of Appeals not only denied defendant the protection of the First Amendment, but also reversed that portion of the District Court's order, saying that "[w]hether the aggregate of plaintiff's damages should have reached $110,000 is not within our province — nor that of the district court — to determine." 438 F.2d at 440 (R. 92a)

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 9, 1971

APPENDIX

ALTOONA CLAY PRODUCTS, INC.,
a corporation, Plaintiff,

v.

DUN & BRADSTREET, INC.,
a corporation, Defendant.

Civ. No. 63-724.
(37 F.R.D. 460)

UNITED STATES DISTRICT COURT
W. D. PENNSYLVANIA.

May 14, 1965.

WEBER, District Judge.

Plaintiff corporation brought the within diversity action by complaint filed August 21, 1963, alleging a libel on its business reputation.

By an Indenture dated February 28, 1964, Altoona Clay Products, Inc., assigned to John R. Vogle of Johnstown, Pennsylvania:

> "* * * all the real estate and also all goods, chattels, effects and property of every kind, real, personal and mixed, and more so all of the entire stock and fixtures (of said corporation) * * * To have and to hold, receive and take the same to the said party of the second part, his heirs and assigns to the proper use and behoof of said party of the second part, his heirs, and assigns forever; *in trust, however,* and to the intent and purpose that the said party of the second part shall, as soon as convenient, sell and dispose of all the lands, goods, and chattels of the party of the first part * * * and collect and recover all the outstanding claims and

debts to it, the said party of the first part due * * * And to more effectually enable the party of the second part to carry into effect the purpose of this trust with the said party of the first part, *the said party of the first part does hereby nominate and appoint the said party of the second part true and lawful attorney, irrevocable, to ask, demand, sue for, levy, recover and receive all sums of money to it due,* to give acquittances or other sufficient discharges in the law therefor, and to make such compromises or other arrangements as he may deem to this trust," (Italics supplied).

Defendant has moved for Summary Judgment, claiming inter alia, that an assignee of plaintiff's assets for the benefit of plaintiff's creditors is an indispensable party to this action. Defendant further argues that even should his Motion for Summary Judgment not be granted, he is entitled to have on the record a party having the interest of the plaintiff assigned to him so that the rights, the interests and the bias of witnesses will be apparent, and should there be a judgment against defendant, defendant then will be protected against a duplication of claims.

Defendant asserts that he is entitled to have plaintiff's claim dismissed under Rule 12(b) (7) of the Fed.R.Civ.P. for failure to join an indispensable party. However, Rule 12(b) provides that:

> "A motion making any of these defenses shall be made before pleading if a further pleading is permitted."

In this case an answer has been filed, extensive discovery undertaken, pretrial proceedings concluded, and the

case listed for trial. The matter is not proper for Summary Judgment on this ground at this late date.

We think that this matter is properly to be treated under the provisions of Rule 25(c) and Rule 21:

Rule 25:

"(c) *Transfer of Interest.* In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." * * *

"Rule 21.

"*Misjoinder and non-joinder of parties.*

"Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just."

For the reasons that we shall set forth in more detail below we believe the proper disposition of this contention raised as grounds for Summary Judgment will be made by an order under Rule 25(c) and Rule 21.

The plaintiff has resisted the demand of the defendant that the assignee, John R. Vogle, be substituted as plaintiff or joined with the plaintiff in this action for the reason that the claim which is asserted is an action in tort for unliquidated damages which is not subject to assignment. While we can agree that there are certain types of tort claims which are not subject to assignment such as actions in tort for personal injuries, or libel and slander of an individual and other such ac-

tions as are held to be personal and not to survive the claimant, we do not believe that the principle is applicable to the type of claim which is at issue here.

The nature of this transfer of interest is similar to the transfer of title in bankruptcy proceedings and the same question has arisen. Logic compels us to follow the reasoning of the bankruptcy cases.

The Bankruptcy Act, § 70, sub. a(5), provides that rights of action ex delicto for libel slander, injuries to the person of the bankrupt etc. * * * shall not vest in the trustee, unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration or other judicial process. Collier on Bankruptcy, 14th Ed. Vol. 4 § 70.28[3], page 1250, states:

> "* * * However, an action for libel, existing in favor of a bankrupt corporation, is based upon such an injury to the bankrupt's property that title passes to the trustee under § 70a (6), and hence is not affected by the first proviso in § 70a (5)."

citing Empire Tractor Corp. v. Time, Inc., 91 F.Supp. 311, (E.D.Pa.1959); In re New York Woman, Inc., 34 F.Supp. 831, (E.D.N.Y.1940), and Schmidt v. Esquire, 210 F.2d 908 (7th Cir. 1954) Cert. Den. 348 U.S. 819, 75 S.Ct. 31, 99 L.Ed. 646.

In Empire Tractor Corp. v. Time, Inc., 91 F.Supp. 311 (E.D.Pa.,1959), the Empire Tractor Corporation had brought a libel action against Time, Inc. Upon the bankruptcy of the plaintiff the Trustees petitioned for leave to intervene and be substituted as parties plaintiff in the libel action commenced by plaintiff corporation

prior to the time of their appointment. The defendant objected that inasmuch as an action for libel is not subject to attachment in Pennsylvania (Selheimer v. Elder, 98 Pa. 154), the language of § 70, sub. a (5) deprived the Trustees of any interest in the action. The Court stated at p. 312:

> "I cannot agree that the addition of the language in Section 70, sub. a(5) as quoted, is pertinent to the resolution of the issue. That language obviously has reference to the rights of action of an individual, as indicated by the references to 'injuries to the person' or to a 'relative' of the bankrupt, and by the reference to 'death, seduction, and criminal conversation.' Of course, title to such an action as one for the libel of an individual does not vest in the trustee. A corporation's cause of action for libel, however, is concerned exclusively with an injury to property, and not at all with the intimate, personal injury to moral character and reputation. 'An action for libel existing in favor of a bankrupt corporation is based on such an injury to the bankrupt's property that title passes to the trustee under Section 70a(6), and is not affected by the language of the first proviso in Section 70a(5)."

(citing Collier on Bankruptcy, 14th Ed. Vol. 4, § 70.28, p. 1173.)

In the case of In re New York Woman, Inc., 34 F.Supp. 831 (E.D.N.Y.1940), it was contended that the Trustee could acquire title only to property which could, prior to the filing of the petition in bankruptcy, have been transferred by the bankrupt; and since a

libel action is one for personal injury it is not transferable. The Court answered this by reciting the provisions of § 70, sub. a(6), in which title is vested in the Trustee by operation of law to rights of action arising upon contracto or from the unlawful taking or detention of, or injury to, his property. The Court stated that in New York it has been held as a general rule that a corporation may maintain an action for libel when the published article assails its management or credit and inflicts injury upon its business or property.

> "* * * A corporation has no moral character and reputation which might be injured, but only business assets that can be injured. Thus, in the case of Adolf Philipp Co. v. New Yorker Staats-Zeitung, 165 App.Div. 377, 392, 150 N.Y.S. 1044, 1053, it was stated: 'There is however, a marked difference between an action by an individual for libel and one by a corporation, inasmuch as the basis of an action by an individual is usually the injury to his moral character and reputation, whereas, those elements are necessarily eliminated in an action by a corporation, which can only be damaged by an attack upon its business methods of a nature calculated and tending to injuriously affect it pecuniarily in its business reputation and credit * * *.'"
>
> * * *
>
> "It might truthfully be said, therefore, that an action for libel, by a corporation, is such an injury to the bankrupt's property that the title to the cause of action passes to the trustee in bankruptcy under Section 70, sub. a(6)."

Appendix.

There has always been a question in Pennsylvania as to whether the rule was applicable to the assignment of actions in trespass for damages done to personal property. One of the principal tests as to the assignability of a cause of action in tort for damages to personal property is whether or not the action is one which would survive to the property owner's personal representative. The logic of this rule is certainly not applicable to the claim of a corporation whose existence is perpetual.

It must be recorded, in fairness to the defendant, that the lateness in making this motion with reference to the real party in interest is due to the fact that the assignment only came to its attention shortly before the Pretrial Conference in this case on February 18, 1965. (Pretrial Record, p. 8).

Where the reason for the rule disappears the rule is gone. The injury complained of in this case was a libel on the business reputation and credit of the plaintiff corporation and the damages claimed are the consequence of a loss of its credit and a loss of its profits because of the libel. The instrument by which the assignment was made as it appears of record in these proceedings clearly shows that it was the intent and purpose of the plaintiff corporation to assign all of its assets to the Trustee for the protection of its creditors. Thus the Trustee is the real party in interest. If the plaintiff's allegations are supported it is of the utmost importance that any damages to the business reputation of plaintiff which resulted in the consequences claimed by the plaintiff inure for the benefit of its creditors. Defendant will likewise be protected against multiple claims.

Therefore, while we see no basis for granting Summary Judgment or a Motion to Dismiss for the failure to join the trustee-assignee for benefit of creditors we will nevertheless under the provisions of Rules 25 and 21 of the Fed.R. of Civ.P. order the joinder of the Trustee as a party plaintiff, or in the alternative the substitution of the Trustee for the party plaintiff, and in the event of the failure to do so within the time allotted will dismiss the plaintiff's action.

II

Defendant raises as his second grounds for Summary Judgment the argument that plaintiff's cause of action is not grounded upon libel per se, but libel per quod which requires the pleading of special damages, both under the substantive Pennsylvania law upon which the cause of action is grounded, and under the provision of Rule 9(g) of the Federal Rules of Civil Procedure.

Plaintiff answers that the false report of a judgment entered against it published by defendant is libel per se and requires no allegation of special damages. With this we cannot agree. We find that the weight of authority is to the effect that the false or mistaken publication that a judgment has been recorded against a business enterprise is not libelous per se. McDonald v. Lee, 246 Pa. 253, 92 A. 135, L.R.A.1916B, 915; Shaines v. Dun & Co., 8 Pa.Dist. & Co.R. 597 (Phila. 1927). This view is not confined to the Pennsylvania cases. Furthermore, the determination of this matter rests solely in the court. Cosgrove Studio and Camera Shop, Inc. v. Pane, 408 Pa. 314, 182 A.2d 751 (Pa.1962).

We then turn to the question of whether plaintiff has sufficiently pleaded the necessary special damages to support a cause of action for libel per quod. While plaintiff originally pleaded in paragraphs 10, 11 and 15 of its complaint general averments that persons who formerly dealt with him in his business have refused, either in whole or in part, to engage in further business, to his financial loss and damage; that credit has been restricted or refused to him; and that he has thus sustained a loss of approximately $168,000, as a direct result of the publication, these alone would have been insufficient in our opinion to sustain the cause of action for libel per quod, had timely action been taken by defendant. However, since under the Federal practice, the defendant has ample opportunity to learn the details of the claim made against him, we feel that the Defendant's Motion for Summary Judgment on this ground cannot prevail at this time. Under the Federal practice the pleadings are supplemented by discovery and pre-trial procedures so that the Defendant may be informed of the details of the claim made against him and be in a position to defend. Here defendant has made extensive discovery, by interrogatories, production of plaintiff's corporate books and records, depositions and pre-trial procedures. Defendant, after all these procedures, should be fully informed of the nature of plaintiff's claims and be in a position to defend against them.

We feel that this matter cannot, on the eve of trial, be determined on a Motion for Summary Judgment which is essentially a Motion to Dismiss for failure to state a claim upon which relief can be granted. Such a matter can only be granted under the provisions of Rule 56(c):

> "* * * if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Such is not the case here.

Appendix.

ALTOONA CLAY PRODUCTS, INC., a corporation,
Plaintiff,
v.
DUN & BRADSTREET, INC., a corporation, Defendant,
v.
C. R. GROVE, Joined as plaintiff by Court Order.

Civ. A. No. 63-724.
(246 F.Supp. 419)

UNITED STATES DISTRICT COURT
W. D. PENNSYLVANIA

Oct. 27, 1965.

WEBER, District Judge.

In this diversity action for libel the Court had previously held that the false report of the entry of a judgment against plaintiff corporation supplied to certain inquiring subscribers of defendant's mercantile credit reporting system was not libel per se, and required proof of special damages. (37 F.R.D. 460). The defendant had also moved for summary judgment on the ground that items of special damages were not specifically pleaded in the complaint as required by Rule 9(g) of the Fed. R. of Civ. P., and by the substantive law of Pennsylvania, which required the allegations of special damages to support the cause of action pleaded here. Bogash v. Elkins, 405 Pa. 437, 176 A.2d 677 (1962). The Court denied the defendant's motion for summary judgment because it was raised after defendant had availed itself of extensive discovery procedure by which it learned or could have learned all of the details of special damages upon which plaintiff was relying. Mil-Hall Textile Co. v. Dun & Bradstreet, Inc. D.C., 160

F.Supp. 778 (1958). We felt, however, that had timely action been taken by defendant, plaintiff's allegation of special damages in the complaint would have been insufficient to sustain the cause of action for libel per quod. See 37 F.R.D. at 464.

The plaintiff, being thus on notice of the requirement of proof, proceeded to trial before a jury, and the presentation of plaintiff's evidence required several days. At the close of the plaintiff's evidence, defendant moved for a directed verdict on the ground, inter alia, that "plaintiff had failed to present any evidence of specific or precise or determinable money damages as required in a libel per quod." The Court granted this motion on this specific ground and a verdict was directed for defendant. Plaintiff has now moved for a new trial, limiting its averments of errors to those matters concerning the subject of damages, since this was the basis upon which the Court acted in directing the verdict.

In considering plaintiff's motion and in weighing all of the evidence and the inferences reasonably derived therefrom in the light most favorable to the plaintiff, we must first consider the evidence within the framework of the cause of action pleaded. Plaintiff's evidence showed that the publication was false, that it came to the attention of about a dozen of its suppliers who were extending credit to it on liberal terms, that at about the time of the publication and thereafter a number of these supplying firms became more restrictive of their credit both as regards to time and to amount, that certain suppliers demanded immediate settlement of accounts due beyond a certain date, that these demands exhausted its available ready cash, that be-

cause of limited credit arrangements with suppliers it did not submit bids to supply the brick on certain large building projects of the type which it formerly bid for, that the year 1963 was a very good year in the building trade for prospective sales as compared to the prior two years, and that its volume of sales for the year 1963 was less than that for the prior two years despite an increase in building activity, and at the close of business for the year 1963 it had suffered a loss of $18,000, its accounts payable exceeded his accounts receivable and it was forced to go out of business. The cessation of business and the consequent liquidation resulted in the forced sale of his business assets at a loss.

Opposed to this evidence, plaintiff's own evidence also shows that its sales had declined steadily from 1958, the inception of its business to the end of 1962, and that it had suffered a loss both in 1961 and 1962 prior to the publication of the alleged defamatory report. Plaintiff's own financial statements placed into the evidence showed that the plaintiff corporation suffered a severe shortage of working capital by reason of the retirement of the outstanding capital stock of a majority stockholder at the end of 1959. While the year 1960, the first year of operation under its new management, was a good year, the plaintiff's president had testified that this was due in large measure to a sales contract for an institution in West Virginia. Plaintiff attributed the sharp decrease in sales in 1961 and 1962 to adverse conditions in the building trade but the margin between its accounts receivable and accounts payable continued to be narrow and again the financial report of plaintiff corporation showed that current liabilities exceeded current assets by the end of 1962.

Appendix.

The decline in plaintiff's gross sales for 1963, after the publication of the alleged defamatory statement, follows the same path of decline as is exhibited in the prior three years. The loss of profit for the year 1963 following the alleged defamation, while considerably greater than the losses of the prior two years, has no probative value in view of the evidence of the continuous worsening condition of plaintiff corporation from 1960 on. The evidence does not show that the business has been conducted at a profit for a sufficient length of time and with such an established trade that profits could be reasonably ascertainable. 15 Am.Jur. Damages § 157.

Plaintiff's evidence also fails to establish a causal relationship between the credit report and any ensuing damages. The credit report in question was published on January 9, 1963, and plaintiff only became aware of it in April 11, 1963 by reason of a call from an irate creditor who interpreted the report to mean that plaintiff had mortgaged assets or real estate to secure a loan to finance accounts payable. This creditor testified that he had suggested such a course of action to plaintiff's president and plaintiff's president had stated that he had no assets which he could use as collateral. The irate creditor felt that he had been deceived and that plaintiff corporation had secured such a loan on its property and had paid other creditors but had failed to pay him. Even after the complete truth was made known to this creditor he still insisted upon arrangements to bring his account up to date by cash and notes, and thereafter imposed stricter credit terms. Plaintiff testified that other creditors in the months following the alleged defama-

tory report were pressing him and were restricting his credit terms and insisting upon payment of overdue accounts, but nowhere does it appear from any testimony that because of the report any single supplier cut off or curtailed plaintiff's credit. No single credit manager of plaintiff's supplying companies appeared to testify that this had been the result. Furthermore, there was no legally sufficient evidence to prove that any such credit restrictions resulted in any specific loss of sales which plaintiff might otherwise have made. While plaintiff's president and other witnesses testified that delivery of bricks to plaintiff's trucks at the supplier's plants was refused. in some instances it was never shown that such refusal was directly related to the erroneous credit report.

As to the business which plaintiff's president testified he might otherwise have received, his testimony amounts to a failure on his part to submit bids for certain contracts to be awarded which he thought he might obtain because of prior business relationships. No specific figures as to the identity, size or amount of such prospective purchases, the prospective profit thereon, or other matters which would reduce such lost prospects to damages capable of computation were produced by plaintiff.

Plaintiff's cause of action falls within the following class:

"Restratement of the Law, Vol. III, *Torts.*

"Topic 6. DEFAMATORY COMMUNICATIONS CAUSING SPECIAL HARM.

§ 575. Slander Creating Liability Because of Special Harm.

One who falsely and without a privilege to do so publishes a slander which, although not actionable per se, is the legal cause of special harm to the person defamed, is liable to him."

Comment:

* * * * * * *

b. *Special harm.* Special harm as the words are used in this Chapter is harm of a material and generally of a pecuniary nature. The special harm must result from conduct of a person other than the defamer or the one defamed which conduct is itself the result of the publication or repetition of the slander * * *. Loss of reputation to the person defamed is not sufficient to make the defamer liable under the rule stated in this Section unless it is reflected in material harm. * * * If, however, the loss of reputation results in material loss capable of being measured in money with approximate exactness, the fact that the lowered social standing resulting from the slander itself causes the acts which produce such loss does not prevent the tangible loss from being special harm. * * * Special harm may be a loss of presently existing advantage, as a discharge from employment. It may also be a failure to realize a reasonable expectation of gain, as the denial of employment which, but for the currency of the slander, the plaintiff would have received." * * *

The general rule has also been summarized as follows:

53 C.J.S. *Libel and Slander* p. 364.

"§ 240. Compensatory Damages in General.

If the words are not actionable per se, there can be no recovery of general damages. Special damages are such as have actually occurred, computable in money, which are the natural, but not the necessary, result of the alleged wrong." * * *

The Pennsylvania cases require both the allegation and proof of specific item of damage to support the recovery. McDonald v. Lee, 246 Pa. 253, 92 A. 135, L.R.A.1916B, 915 (1914); Pitchard v. Wenger, 268 Pa. 114, 110 A. 726 (1920); Weaver v. Phillips, 231 Pa. 325, 80 A. 526 (1911); Hygienic Fleeced Underwear Co. v. Way, 35 Pa. Super. 229 (1908).

The Pennsylvania statute requires:

"(1) In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

* * * * * * *

(f) Special harm resulting to the plaintiff from its publication." Act of 1953, Aug. 21, P.L. 1291, 12 P.S., § 1584a.

The Pennsylvania rule has been summarized as follows:

"§ 443. WHAT CONSTITUTES SPECIAL DAMAGE.

To constitute special damage sufficient to render actionable the types of slander which are not actionable per se (See § 4401 supra), it is essential that it be made to appear that the slanderous utterance was a proximate or legal cause of plaintiff's sustaining a pecuniary loss in the sense of loss of something of material value from a dol-

lar — and cents — point of view, as, for example, where it appears that by reason of such slander, plaintiff failed to secure a contract or other advantage that he otherwise would have gotten, or that he was discharged from his employment, or lost customers, etc." Summary of Pennsylvania Jurisprudence, Torts II § 443.

The most detailed statement of the Pennsylvania rule is contained in Shaines v. R. G. Dun & Co., 8 Pa.Dist. & Co. R. 597 (Phila. County, 1927). Under this case special damages means actual and concrete damages capable of being estimated in money, established by specific instances such as actual loss due to withdrawal of trade of particular customers, or actual loss due to refusal of credit by specific persons, all expressed in figures. These are requirements of pleading as well as proof. See Fowler v. Curtis Publishing Co., 86 U.S.App.D.C. 349, 182 F.2d 377 (1950).

Plaintiff has cited Smail v. Flock, 407 Pa. 148, 180 A.2d 59 (1962); Hoober v. New Holland Water Co., 43 Pa. Super. 262 (1910); Western Show Co. v. Mix, 308 Pa. 215, 162 A. 667 (1932), and Osterling v. Frick, 284 Pa. 397, 131 A. 250 (1925), in support of the proposition that uncertainty as to the amount of damages is not ordinarily grounds for refusing to allow any damages. While these are not cases of defamatory statements which rest upon proof of special damages to support the cause of action, nevertheless a reading of these cases leads us to the conclusion that while uncertainty as to an amount does not preclude the award of any damages, the evidence must be sufficient to furnish a basis from which a reasonable calculation

can be made. In Osterling v. Frick, cite supra, the Court said: (p. 403, 131 A. p. 251)

> "* * * damages * * * cannot be based on a mere guess or speculation, yet, where the amount may be fairly estimated from the evidence, a recovery will be sustained even though such amount cannot be determined with entire accuracy."

There is nothing in this entire record which would form a basis for any calculation by a jury of the damages which directly and proximately flowed from the defamation complained of.

Plaintiff relies heavily on the language of the Supreme Court of Arkansas in Dun & Bradstreet, Inc., appellants v. Robinson, 233 Ark. 168, 345 S.W.2d 34, at page 45. There the trial court had determined that the defamation was libel per quod which required the production of proof of special damage. The court held that there was substantial evidence to show that the defendant acted with conscious indifference and reckless disregard of the rights of plaintiff in publishing the report and thus the protection afforded by the conditional privilege of the communication was lost. On a submission to the jury an award for special compensatory damages was made but no punitive damages sought by plaintiff were awarded. Defendant appealed on the grounds, inter ali, that there was no substantial evidence in the record to support a finding of either the fact or amount of damages accruing to plaintiff as a proximate result of the publication. A review of the reported decision shows that there was extensive testimony relative to the special damages, see pp. 40, 41, 42 and 43. The recital of this evidence in the opinion of the Arkansas Supreme Court clearly demonstrates

that the nature, quantity and specific detail of the supporting evidence of damages in that case was far different from the case at bar. Despite the broad language of its concluding paragraphs as to the necessity of ascertainment of specific amounts lost, the Court concluded;

> "Be that as it may, we deem the proof more than adequate to uphold special past compensatory damages in the amount of $10,000, and future special compensatory damages in the amount of $20,000." 345 S.W.2d at p. 45.

The Robinson case, supra, was considered by the United States Court of Appeals for the 8th Circuit in Dun & Bradstreet, Inc., Appellant v. Nicklaus, 340 F.2d 882 (8th Cir. 1965), where it was contended by the appellant that the District Court erred in applying the standard of the Robinson case since this did not meet the federal standard of "substantial evidence" required to support a verdict, citing Hanson v. Ford Motor Co., 278 F.2d 586 (8th Cir. 1960). The Circuit Court was of the opinion that the District Court followed the "substantial evidence" standard and that the Robinson case did not depart from this rule. It held that from the evidence in the Robinson case, the jury could reasonably conclude that the plaintiff lost customers who were subscribers of defendant's reports, referring to specific items of evidence of special damage in the Robinson case. Our own reading of the decision in the Robinson case leads us to a conclusion that evidence in far greater detail as to specific customers lost as to specific items of income from an established trade, and as to other items of special damage distinguishes that case from

the case at bar, which does not contain these elements of proof.

Defendant's motion for a directed verdict also urged the grounds of failure to allege or prove an innuendo from the words used in the credit report; failure to prove malice on the part of the defendant; and the privileged status of the communication. Because of the position of the Court with respect to the issue of special damages the motion was granted solely on the basis of the failure of proof of special damage as set forth in the foregoing Opinion.

For the reasons set forth above the Motion for New Trial is denied.

ALTOONA CLAY PRODUCTS, INC., Appellant,

v.

DUN & BRADSTREET, INC.

v.

C. R. GROVE, Joined as Plaintiff by Court Order.

ALTOONA CLAY PRODUCTS, INC.

v.

DUN & BRADSTREET, INC.

v.

C. R. GROVE, Joined as Plaintiff by Court Order, Appellant.

Nos. 15709, 15710.
(367 F.2d 625).

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT.

Argued May 17, 1966.
Decided Sept. 8, 1966.
Rehearing Denied Oct. 4, 1966.

Before STALEY, Chief Judge, and MCLAUGHLIN and SMITH, Circuit Judges.

OPINION OF THE COURT

STALEY, Chief Judge.

The appeal in this diversity case requires us to decide several issues involving the Pennsylvania law of defamation. The legal questions, however, are far more simple than they would appear on their surface or the parties would have them.

The facts may be abbreviated for the purposes of this appeal. The plaintiff, Altoona Clay Products, Inc., is a Pennsylvania corporation and was engaged in busi-

ness as a brick and tile broker. Being a sizable concern, its credit standing became the subject of analysis by the defendant, Dun & Bradstreet, Inc. From time to time the defendant issued credit reports concerning the plaintiff to its brick and tile suppliers and other creditors. Sometime in early January, 1963, Dun & Bradstreet requested one of its employees to up-date its credit report on the plaintiff. In his search of the records in the Blair County Courthouse, the employee discovered in the judgment index an unsatisfied judgment against Altoona Clay Products *Company* for $60,000.[1] On January 9, 1963 Dun & Bradstreet issued a credit report covering plaintiff. The report, which is reproduced below,[2]

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1. A check of the judgment itself would have revealed that it had been entered against "BRICK AND TILE SALES COMPANY, formerly THE ALTOONA CLAY PRODUCTS COMPANY." See note 6, infra.

2. *DUN & BRADSTREET REPORT*
2483 — Jan. 1963
RATING UNCHANGED
Sic — Name & Address — AD. 16 JAN. 9, 1963 N. 50 98 — ALTOONA CLAY PRODUCTS, INC., JOBBERS, 312 UNION AVENUE, ALTOONA, PA., BLAIR COUNTY.
Started — 1959. *Rating* — E 3½.
TRADE — On Oct. 19, 1962 one supplier reports extending high credit of $15,500; owes $7,300; $5,600 past due; terms 3-10-25 net 30; prompt to slow payments, sold for over three years to 10-62.

CONDITION — On Jan. 7, 1963 officers absent and office secretary declined all information. Outside sources estimated:

Cash	$ 4,200	Accts. Pay	$35,000
Accts. Rec.	77,000	Notes Pay	28,000
Mdse.	11,000	Owe bank	8,000
Fixt. & Equip.	9,000	Accruals & Taxes	5,000
		Mtge.	10,500

among other things listed in two columns items which would normally fall into the categories of assets or liabilities. The estimated total of assets was $101,200, while plaintiff's total liabilities were estimated at $86,500. Below these columns, however, appeared the following:

> "A check of the Blair County Records on Jan. 7, 1963 revealed a judgment filed by the Altoona Central Bank #280 term 10-61 dated Nov. 10, 1961, for $60,000 A.S.B. Penal * * *."

Volume for 1962 comparable to that of the previous year. Receivables heavy and slow turning and limit cash funds.

A check of the Blair County Records on Jan. 7, 1963 revealed a judgment filed by the Altoona Central Bank #280 term 10-61 dated Nov. 10, 1961, for $60,000 A.S.B. Penal also unsatisfied was a secured transaction filed by the First National Bank of Altoona dated June 2, 1962 #14054 covering, past, present and future accounts receivables.

Public records show mortgage amounting $10,800 entered by First National Bank.
1-9 (65 563) (18)

PLEASE NOTE WHETHER NAME, BUSINESS AND STREET ADDRESS CORRESPOND WITH YOUR INQUIRY.

The foregoing report is furnished, at your request, under your Subscription Contract, in STRICT CONFIDENCE, by DUN & BRADSTREET, INC. as your agents and employees, for your exclusive use as an aid in determining the advisability of granting credit for insurance, and for no other purpose. DUN & BRADSTREET, INC. does not guarantee the correctness of the information contained herein and shall not be liable for any loss or injury caused by the neglect or other act or failure to act on the part of said company, its officers, agents or employees, in procuring, collecting or communicating said information. 9R2-6 (9-61)

There was, in fact, no judgment against the plaintiff corporation.

Plaintiff brought suit against the defendant, alleging that the circulation of this report to its suppliers caused them to restrict plaintiff's credit to such an extent that plaintiff suffered great financial loss. The complaint incorporated substantially the same quote as appears above; however, the entire report was made part of the answer. After the parties had completed extensive discovery, the defendant moved for summary judgment inter alia on the grounds that the alleged libel was a libel per quod and required the pleading of special damages and that plaintiff had failed to so plead. The district court found that the alleged libel was a libel per quod but held that plaintiff's pleading was sufficient.[3]

On the eve of trial, plaintiff's counsel for the first time expressly indicated that his case turned, at least in part, on the theory that defendant's report had imputed insolvency to the plaintiff. Despite this new assertion, the district court adhered to its position that the alleged defamation was a libel per quod. Plaintiff's counsel was prohibited from mentioning "imputed insolvency" in his opening to the jury and from eliciting testimony along those lines.

Prior to discussing the issues raised on this appeal, certain salient features of the law of defamation in general, and the law of Pennsylvania in particular, should be clarified. Perhaps an over-generalization of the case law in Pennsylvania is that it follows the Restatement of Torts, §§ 558 et seq. The Pennsylvania

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3. The district court opinion denying the motion for summary judgment appears in 37 F.R.D. at 460.

courts have unequivocally committed themselves to the Restatement's definition of defamatory communication:

> "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement, Torts § 559.

Cosgrove Studio & Camera Shop, Inc. v. Pane, 408 Pa. 314, 182 A.2d 751 (1962); Birl v. Philadelphia Electric Co., 402 Pa. 297, 167 A.2d 472 (1960). It is equally clear that Pennsylvania follows §§ 570 and 573 of the Restatement whereby publication of slanderous statements concerning one's business, trade or profession are made actionable per se, that is, they are actionable without proof of special harm. Fegley v. Morthimer, 204 Pa. Super. 54, 202 A.2d 125 (1964); Cosgrove Studio and Camera Shop, Inc. v. Pane, supra. "For obvious reasons, the presumption that words are defamatory arises much more readily in cases of libel than in cases of slander." Collins v. Dispatch Pub. Co., 152 Pa. 187, 25 A. 546, 547 (1893). This being so, this case does not require us to determine whether all libels are actionable per se in Pennsylvania.[4]

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4. The libel per se—libel per quod distinction is presently the subject of a heated controversy in the American Law Institute. The dispute revolves about the proposed changes in § 569 of the Restatement of Torts, Tent.Draft No. 12, Restatement of the Law Second, Torts. The views of the opponents and protagonists of the change are respectively set forth in Eldredge, The Spurious Rule of Libel Per Quod, 79 Harv.L.Rev. 733 (1966), and Prosser, More Libel Per Quod, 79 Harv.L. Rev. 1629 (1966). Mr. Eldredge states, at 743, that Pennsylvania adopted the Restatement position that

At this point, we must note a distinction which is most important. The determination of whether particular words are actionable without proof of special damages ("actionable per se") is without question a matter of state substantive law. Sweeney v. Philadelphia Record Co., 126 F.2d 53 (C.A.3, 1942); Sweeney v. Schenectady Union Pub. Co., 122 F.2d 288 (C.A.2, 1941). Not to be confused with this determination is whether a particular publication is defamatory on its face ("defamatory per se," "libelous per se," or "slanderous per se"). This latter determination is strictly procedural and means only that an "innuendo" must be or need not be pleaded. The authorities tell us that these pleading requirements are oft-times ridiculous and frequently result in injustice. McCormick, Damages § 113 at 417-419; Prosser, Torts § 92 at 79 et seq. (2d ed.). Since the Federal Rules greatly reduced the importance of technical pleading, we need only state that these technical rules must give way when they come in conflict with our simplified rules of pleading. Continental Collieries v. Shober, 130 F.2d 631 (C.A. 3, 1942); see also Watson v. Cannon Shoe Co., 165 F.2d 311, 313 (C.A.5, 1948).

The pivotal issue on this appeal is whether the credit report issued by the defendant is actionable without proof of special damages. We have already noted that Pennsylvania treats slanderous words injurious to one's

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all libels are actionable per se in McAndrew v. Scranton Republican Pub. Co., 165 Pa. Super. 276,67 A.2d 730, rev'd on other grounds, 364 Pa. 504, 72 A.2d 780 (1950), whereas Dean Prosser, at 1632-1633, lists McAndrew as a case in which the defamation would have been actionable per se even if it had been slander. Our reasoning in this case is identical with that employed by Dean Prosser in his discussion of the McAndrew case.

business or profession as actionable per se. Hartman Co. v. Hyman, 87 Pa.Super. 358, aff'd, 287 Pa. 78, 134 A. 486, 48 A.L.R. 567 (1926); Phillips v. Hoefer, 1 Pa. 62 (1845).

The criteria for determining when a publication is injurious to one's business is spelled out in Sarkees v. Warner-West Corp., 349 Pa. 365, 37 A.2d 544 (1944):

> "* * * If this publication imputes insolvency, financial embarrassment, unworthiness of credit, or failure in business of the plaintiff, it would be libelous. Phillips v. Hoefer, 1 Pa. 62 * * *; Hayes v. Press Company, Limited, 127 Pa. 642, 18 A. 331, 5 L.R.A. 643 * * *; Will (National News Co.) v. Press Publishing Co., 309 Pa. 539, 164 A. 621." 349 Pa. at 367, 37 A.2d at 546.

Especially relevant to the facts presently before us is the case of Hartman Co. v. Hyman, supra. In that case, plaintiff's name was confused with that of another purchaser from produce dealers who were members of a mutual credit bureau. It had been reported by the defendants to the bureau that "J. Hartman" was indebted to them. The agency printed a notice which was circulated to all of its members informing them that plaintiff had not paid its account. As a result of this and the credit agency's rule that members should not sell on credit to a person so listed, plaintiff was unable to purchase produce on credit and was required to cease operations until his name was removed from the "black list."[5]

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5. Appellee maintains that the "black list" distinguishes *Hartman* from the present case. The fallacy in this reasoning is that it places a premium on form rather than substance. The alleged result of defendant's publication in this case is identical with that found by the Superior Court in the Hartman case.

Though the appellant had apparently raised no issue with regard to special damages, the court stated:

> "* * * It is well settled in this State that when words are spoken of another which tend to injure him in his business or calling, they are slanderous per se and neither express malice nor special damage need be proved. [Citing cases.] Legal malice exists where a wrongful act is done intentionally. [Citing cases.] *That the slanderous words complained of by plaintiff tended to injure his business credit must be admitted.*" 87 Pa.Super. at 361-362 (Emphasis supplied.)

In light of the foregoing, the plaintiff's allegation that defendant had "erroneously" reported to plaintiff's creditors that a large judgment had been entered against it was actionable per se. The complaint clearly states that plaintiff's credit was injured as a result of the publication. In arriving at this conclusion we are not unmindful of the cases relied upon by the district court in holding that this libel was not actionable per se. We believe its reliance on McDonald v. Lee, 246 Pa. 253, 92 A. 135, L.R.A. 1916B, 915 (1914), and Shaines v. R. G. Dun & Co., 8 Pa.Dist. & Co.R. 597 (Phila. C.P., 1927), is misplaced.

The McDonald case is a clear illustration of Dean Prosser's criticism of "per se" labels in defamation cases. In that case, plaintiff brought suit against a physician who was responsible for placing his name on a list of patients who were slow in paying for medical services. The court first examined whether plaintiff had been injured by reason of the publication and concluded that he had not. The court then stated that the publica-

tion was not "libelous per se"; however, a subsequent sentence states that plaintiff's case could become "actionable" only upon allegation and proof of special damages. In summary, the court merely held that plaintiff had not been denied credit and, therefore, he was required to allege and prove special damages.

There is even less substance in the Shaines case. There, the plaintiff sought to recover for defendant's false publication that plaintiff had been sued for $500 for goods sold and delivered. He alleged that "by reason of said publication * * * divers persons with whom the plaintiff had dealings in his lawful art, trade and business refused * * * the plaintiff * * * [his] usual or customary terms, and * * * refused to sell goods and merchandise to the plaintiff, causing plaintiff great inconvenience and financial loss." Sustaining a demurrer to the complaint, the court stated:

> "* * * There is nothing in the publication in the case at bar which suggests or intimates, or from which anyone reading it could infer, that the plaintiff did not pay his just debts, or that he was dishonest, embarrassed or insolvent." 8 Pa.Dist. & Co.R. at 598.

In light of the court's earlier statement that "any publication is libelous per se which falsely impeaches the credit of a merchant or trader by imputing to him failure or refusal to pay his just debts, or which imputes to him financial embarrassment, or dishonesty * * * [and that] in such cases, damage is presumed and need not be proved," it is apparent that its holding turned on the failure of the plaintiff to allege loss of its credit.

Appellant also contends that the report imputed insolvency to it, and thus, is actionable per se. The problem is both procedural and semantical. Appellee maintains that imputed insolvency requires the pleading of an innuendo under the law of Pennsylvania. It properly states that where the publication is not libelous per se (defamatory on its face), an innuendo must be pleaded. Its disjunctive argument would appear to be that if the credit report on its face impute insolvency to the plaintiff, plaintiff's failure to incorporate the report in its complaint precluded it from raising the issue of imputed insolvency at trial.

Since these positions are disjunctive, we must decide at the outset whether the credit report on its face imputes insolvency. There can be no doubt that this determination is one to be made by the court, for in the Cosgrove Studio case, discussed above, the Supreme Court of Pennsylvania noted:

> "* * * Secondly, most important and crucial, the words are defamatory on their face. Clearly, the characteristics and dishonest conduct imputed in the advertisement *need no extrinsic proof of explanation*. In short, the words in themselves are defamatory and import the serious sense attributed to them." 408 Pa. at 319, 182 A.2d at 753. (Emphasis supplied.)

We read the report as not only imputing insolvency but demonstrating it: plaintiff's estimated liabilities (the liabilities column plus the $60,000 judgment) are reported as far exceeding its estimated assets. The report is, therefore, defamatory on its face.

We must now consider whether plaintiff's failure to attach a copy of the report or recite it in its entirety

was a fatal defect in its pleadings. At this juncture, however, we must note that plaintiff in its complaint identified the report and thereby incorporated it by reference.

The decision of the district court to prohibit discussion of and testimony concerning imputed insolvency cannot be considered out of context. It was not made on a motion for judgment on the pleadings under Rule 12(c); it was made after the parties had made full use of the discovery procedure, and the court had before it not only plaintiff's complaint but also defendant's answer which included a copy of the report. The court also had before it the discovery proceedings which are replete with references to the plaintiff's assets and liabilities and how recipients of the reports reacted to plaintiff's asset-liability ratio after they were informed that an unsatisfied $60,000 judgment had been entered against the plaintiff.

Under these circumstances and upon consideration of the liberalized pleadings effectuated by the Federal Rules, we hold that plaintiff's failure to attach to its complaint a copy of the report could not preclude it from arguing that the report demonstrated insolvency, nor can we perceive any prejudice to the defendant by plaintiff's belated assertion of imputed insolvency. See Beckwith v. United States, 293 F.2d 471, 473 (C.A.5, 1961).

The publication in question being defamatory on its face and of such a nature that proof of special damages is unnecessary, the plaintiff is entitled to recover unless the defendant can establish either the defense of truth or privilege. Cosgrove Studio & Camera Shop, Inc. v. Pane, 408 Pa. at 317, 182 A.2d at 753.

There is no question before us concerning the issue of truth;[6] however, the appellee does maintain that the publication in question is privileged, and therefore the district court's judgment on its behalf[7] should be affirmed. We agree that publications such as that presently before us are privileged communications under the law of Pennsylvania. Williams v. Kroger Grocery & Baking Co., 337 Pa. 17, 10 A.2d 8 (1940), citing Restatement, Torts § 595; J. Hartman & Co. v. Hyman, 287 Pa. 78, 134 A. 486 (1926), affirming 87 Pa. Super. 358. The privilege, however, is conditional or defeasible. Diamond v. Krasnow, 136 Pa.Super. 68, 7 A.2d 65 (1939); J. Hartman & Co. v. Hyman, supra. The Pennsylvania courts have been most explicit in establishing guidelines for determining whether a particular communication is privileged:

> "* * * 'It has often been said that a privileged communication is one made upon a proper occasion, from a proper motive, in a proper manner, and based upon reasonable and probable cause. [Citing cases.] The immunity of a privileged communication is the exception, and he who relies upon exception must prove all the facts necessary to bring himself within it. [citing cases] *Want of reasonable care and diligence to ascertain the truth, before giving currency to an untrue communication, will destroy the privilege.* [Citing cases.]' The rule of

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6. Defendant's defense of truth appears to rest on its contention that there is an identity of ownership between the former Altoona Clay Products Company, presently named Brick Tile Sales Company, and the plaintiff.

7. The district court's opinion denying plaintiff's motion for a new trial is reported at 246 F.Supp. 419.

> those cases was reaffirmed in Bauswine v. Norristown Herald, Inc., 351 Pa. 634, 645, 41 A.2d 736 * * *." 356 Pa. 307, 315, 51 A.2d 775, 778—O'Donnell v. Philadelphia Record Co., 779 (1947), quoting from J. Hartman & Co. v. Hyman, supra. (Emphasis supplied.) See also Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167, 178, 191 A.2d 662, 668 (1963); Rankin v. Phillippe, 206 Pa.Super. 27, 211 A.2d 56 (1965); Restatement Second, Torts, § 600, Note to Clause (b), Tent. Draft No. 12.

An essential aspect of plaintiff's case in rebuttal to the defense of privilege is that defendant's employee was negligent in failing to consult the records themselves and in relying solely on the Judgment Index in reporting that a $60,000 judgment had been entered against plaintiff. Montgomery v. Dennison, 363 Pa. 255, 261-265, 69 A.2d 520, 524-525 (1949), citing Restatement, Torts § 613. Within the context of the law stated above, this presents a question for the jury, see McGaw v. Hamilton, 15 Pa. Super. 181 (1900), and cannot be decided here.

One further matter requires mention. Since this case will be remanded for a new trial, we must point out that we cannot concur in the district court's conclusion that plaintiff's proof on the issue of damages was insufficient. Though plaintiff's proof was far from conclusive,[8] in light of the Pennsylvania cases, especially those cited by the district court, we believe it was sufficient for the jury's consideration. Cf. Dun

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8. We note in this regard that much of the testimony of Mr. Pegnetter, president of the plaintiff, was improperly excluded.

& Bradstreet, Inc. v. Nicklaus, 340 F.2d 882 (C.A.8, 1965). We make this observation only because the Pennsylvania cases indicate that, like punitive damages, cf. Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167, 191 A.2d 662 (1963), special damages are recoverable in addition to general damages in appropriate circumstances. Montgomery v. Dennison, 363 Pa. at 268 & n. 5, 69 A.2d at 527 & n. 5 (1949).

The judgment of the district court will be reversed and the cause remanded for disposition not inconsistent with this opinion.

Appendix.

ALTOONA CLAY PRODUCTS, INC.,
a corporation, Plaintiff,
v.
DUN & BRADSTREET, INC., a corporation, Defendant,
v.
C. R. GROVE, joined as Plaintiff by Court Order.

Civ. A. No. 63-724.
(286 F. Supp. 899)

UNITED STATES DISTRICT COURT
W. D. PENNSYLVANIA.

July 16, 1968.

OPINION

WEBER, District Judge.

Prior aspects of this case have been reported in 37 F.R.D. 460, 246 F.Supp. 419, and 367 F.2d 625. It is a diversity action based on allegation of libel on plaintiff's business reputation. Defendant is a mercantile agency supplying reports to subscribers as a guide to their business dealings. Plaintiff is a corporation engaged as an independent sales agency, buying brick products from manufacturers and selling to construction contractors. Plaintiff was also a subscriber to defendant's service. In response to an inquiry from an interested subscriber defendant undertook to prepare a new report on plaintiff which was circulated to fifteen (15) subscribers who had requested such reports. After a statement of estimated financial worth, and an estimated statement of assets and liabilities, the report contained two notations taken from the court records of Blair County, Pennsylvania. One was a report that plaintiff had assigned all its accounts receivable, past, present

and future, to a bank. This was true. The other was a notation of the entry of a confession of judgment in a penal sum of $60,000 with a docket number and term. This was false as applied to plaintiff firm, because the plaintiff's name was "Altoona Clay Products, Inc., and the judgment was actually entered against "Altoona Clay Products Company, Inc.", a predecessor to plaintiff's business which had changed its corporate name and sold its personal property and good will to plaintiff corporation when plaintiff was organized, but which continued to own real estate conveyed to it under its former corporate name.

At the first trial of this action, plaintiff was limited to proof of special damages in support of a libel per quod, and the court granted defendant's motion for directed verdict in its favor because of the failure of proof of special damages. On appeal it was determined that a new trial must be granted because the publication was actionable without proof of special damages, and that proof of special damages should be submitted to the jury. The jury found no special damages, but awarded general damages of $110,000. The Court refused plaintiff's request to argue for and receive a charge on punitive damages.

Defendant moves for judgment N.O.V. and for new trial on arguments that will be treated in part in this opinion.

Defendant argues that the verdict is excessive, which requires a new trial, and entirely unsupported by the evidence, which requires a directed verdict for defendant. It is an under-statement to say that the verdict is shocking to the conscience of the court.

While general damages are permissable in an action of libel per se and require no proof of special damages to support them, they are none the less compensatory, and must bear some relation to the evidence. 3 Restatement, Torts, § 621. A business corporation can only be damaged with respect to its credit, its profits and its property. The plaintiff here used the same evidence in support of its claim for general damages as was used to support the claim for special damages. The president of plaintiff corporation testified to the imposition of credit restrictions as a consequence of which he did not bid on certain contract opportunities as a result of which he estimated a loss of profits. We held this insufficient to support a claim for special damages in the first trial of the action, but under the mandate of the Court of Appeals they were submitted to the jury in the second trial. The jury found no special damages.

> "A successful plaintiff in an action for libel or slander is entitled to recover such actual or compensatory damages as are the natural and direct or proximate result of the publication, but not speculative or remote damages, the rule applying to special as well as general damages."
>
> 53 C.J.S. Libel and Slander § 240.

At the trial we were conscious of the liberality that must be exercised in viewing evidence of claims for special damages resulting from an alleged impairment of credit because the nature of such loss precludes definite ascertainment of the specific amount lost. Cf. Dun & Bradstreet v. Nicklaus, 340 F.2d 882 [C.A. 8, 1965]. The nature of plaintiff's evidence was highly speculative but it was nevertheless submitted to the jury. The

absence of special damages is a factor to be considered in weighing the adequacy or excessiveness of general damages awarded, Regan v. O'Toole, 348 Pa. 364, 35 A.2d 55 [1944]. The fact that plaintiff is a business corporation and can be injured by false publication only with respect to its credit, property, or profits, limits the scope of compensatory general damages which it may recover, as distinguished from the damages which an individual can recover. Erick Bowman Remedy Company v. Jensen Salsbery Laboratories, 17 F.2d 255, 257 [8th Cir., 1926]; Farbenfabriken of Elberfeld Co. v. Beringer, 158 F. 802, 804 [3rd Cir., 1908].

We are very conscious of the admonition of Lind v. Schenley Industries, Inc., 278 F.2d 79 [3rd Cir., 1960] that a grant of a new trial must be based on sound grounds and should not be made unless it is quite clear that the jury has reached a seriously erroneous result. The court may be compelled by some undesirable or pernicious element that has been introduced. When a trial has been long and complicated and deals with a matter not lying within the ordinary knowledge of jurors, a verdict may be scrutinized very closely.

There was abundant evidence that the financial decline in this corporation had been proceeding for some years. Its capital had been seriously impaired three years before by a purchase of the outstanding controlling stock from capital contrary to the provisions of the Pennsylvania business corporation code. Even the testimony of the plaintiff's own witnesses, both its creditors and its expert financial witnesses, showed the serious financial straits of the corporation before this publication. The corporation had been delinquent in its accounts, had been given prior notices of credit limita-

tions, and had been refused deliveries for failure to keep its payment commitments. Even after publication of this report, in March of 1963, a creditor imposed a sixty (60) day credit limitation because he felt accounts more than sixty (60) days in arrears were in peril, and plaintiff was over sixty (60) days overdue.

A highly important factor in the minds of witnesses for plaintiff was the truthful memorandum that plaintiff had assigned all its accounts receivable, past, present and future, to a bank, leaving it with few current assets to meet substantial current liabilities.

All of this testimony was reviewed in connection with plaintiff's claim for special damages and on the basis of it the jury found no special damages had been suffered by plaintiff. It is highly inconsistent that on the same evidence they made the award of general damages in question here.

Apart from the lack of evidentiary basis for the damages here there were certain highly prejudicial elements introduced at trial. Despite the prior ruling of the court that it would not submit the question of punitive damages to the jury, and despite the side bar denial upon offer of proof of defendant's financial strength in support of a claim for punitive damages, plaintiff's counsel in his summation argued to the jury in reference to this case:

> "It is going to be watched by many small businesses who will know that by a jury telling a large credit company that they must publish only the truth about their finances, and their credit and solvency, will not be permitted to get away with issue false credits and damaging and even killing little businesses."

This was not inadvertence, it was a deliberately provocative invitation to the jury to disregard their oath, to disregard the charge of the court, and to assess damages against defendant because it was a large corporation and should be punished. The objection to this remark was sustained and the jury admonished, but the courts are well familiar with the ineffectiveness of such admonition once the suggestion has been planted in the minds of the jurors.

A second serious and prejudicial element in the closing address was a suggestion as to how much their damages should be. Plaintiff's counsel referred to the estimated balance sheet shown upon the report in question. He referred to the liabilities shown thereon and totalled them up to $108,900 and then added:

> "Now it has been told to you and it is correct, that all of the assets of this company were turned over to a receiver-assignee for creditors they still owe, somebody who is going to take whatever assets they have and pay the bills that they owed at that time, $108,000.
>
> When they assign these things, these items, they assign all of their property; that includes this lawsuit and any proceeds of that, go to these creditors first to be paid off. You see what they are."

It is curiously noteworthy that the general damage verdict was for $110,000, almost the same figure. In addition to this being a totally unwarranted argument and improper suggestion to the jury, it was untrue because plaintiff did not include the assets shown on the balance sheet which were also for the use of creditors,

and which, according to plaintiff's arguments, showed the plaintiff to be a solvent company.

We do not deem objection to this argument waived by counsel's failure to object. Counsel for the defendant was forced to voice objection to plaintiff's closing at other points, which the court sustained, and defense counsel was being forced into a position of disadvantage by making such objections. Such objections have been recognized as hazardous, London Guarantee & Acc. Co. v. Woelfle, 83 F.2d 325 [8th Cir., 1936], and failure to object is not fatal where obvious prejudice has occurred. Robinson v. Pennsylvania R. R. Co., 214 F.2d 798 [3rd Cir., 1954].

The evidence in this case with respect to damages cannot sustain this verdict. Gross Sales had declined in each year from 1958 and followed the same downward trend in 1963. Net operating losses in 1963 followed the same upward trend as in the prior years. Current liabilities exceeded current assets in 1961 and the ratio increased in 1962. Both of plaintiff's financial experts testified that without regard to the mistaken notation of judgment the company was not financially stable. A very critical factor in the minds of witnesses was the undeniably true item contained on the credit report in question that in 1962 plaintiff had assigned all its accounts receivable, past, present and future, leaving practically no current assets free for the payment of current obligations. By the plaintiff's own evidence, the plaintiff corporation was shown to be insolvent by a number of tests without regard to the publication of the erroneous report of judgment. It was unable to pay current bills. As of December 31, 1962, nine days before

the report in question, the company's own balance sheet showed a net worth of $4,013.13, but the counterbalancing asset was an item listed as an asset worth $4,326, represented by a note of a former employee who had embezzled funds, an item of very doubtful value. Ths financial statement is of doubtful value in proving worth because it did not reflect the serious impairment of capital caused by buying in the controlling stock in the corporation in 1960, and because of its failure to set up any reserve for doubtful accounts receivable which was entered in the 1963 statement as $8,420.16.

Thus the evidence shows that at the time of the publication the corporation had little if any net worth, a consistent history of loss, a consistent history of dwindling sales, a consistent history of lateness in paying accounts, and the assignment of its accounts receivable.

Plaintiff corporation was essentially a one man corporation engaged in sales of brick products. Plaintiff's president was an employee of the former corporation whose mortgage and change of corporate name led to the confusion of names involved here. He and the proprietor of the former business founded a new corporation which bought the business assets of the old. Plaintiff was a minority stockholder, but after a year of operation disagreements arose, and the majority shareholder was bought out by stock redemption using capital of plaintiff corporation and by a peculiar salary bonus arrangement supported in part by profits in 1958, the sole good year. Plaintiff's president participated in a substantial bonus at the same time, and has been the sole or principal stockholder since. Thereafter sales de-

clined, there was no profit, but plaintiff's president continued to draw his salary. When plaintiff corporation ceased to do business plaintiff's president went to work as a salesman for one of it former suppliers and has done well. Plaintiff's president attempted initially to conduct this lawsuit in the name of the corporation and it was only after compulsion of court order that the state appointed receiver for the benefit of creditors, who had received a general assignment of the corporation's assets, was made the real party plaintiff, although the trial was conducted by plintiff's original trial counsel.

We do not regard the evidence of damages suffered by the receiver's sale of assets over a year later at less than their claimed value to be of much value. There is no evidence to support the correctness of the value claimed, and no evidence to show diligence on the part of the receiver. We believe that this evidence is too remote and speculative to have any probative value on the issue of damages, particularly in view of the corporation's history of business decline.

Plaintiff has alleged loss of credit as a result of the erroneous report. This makes his claim actionable per se and entitles him to general damages on proof that credit was so restricted. Regardless of whether loss of credit was actually proven, which we will consider later, we do not believe that loss of credit of a business firm, standing alone, is proof of damages, unless it connects itself with some tangible pecuniary loss of which it is the cause. Eckel v. Murphey, 15 Pa. 488, 495 [1850]; Smith v. Western Union Telegraph Co., 150 Pa. 561, 564, 24 A. 1049 [1892].

On the basis of the foregoing, assuming plaintiff to have met the burden of proof on the other ele-

ments required of it, we find the damages awarded grossly excessive, unsupported by evidence, inconsistent with the finding of no special damages, and subject to the prejudicial influence of improper argument of plaintiff's counsel.

In the first trial of this case the trial court, as a result of arguments on pretrial motions, held that the publication in question, a mercantile report containing an erroneous item reporting the entry of a judgment against plaintiff, constituted a libel per quod which required the proof of special damages. Although defendant had raised the objection that special damages had not been pleaded with particularity, as required by Pennsylvania law, and the Federal Rules of Civil Procedure, the court held that in view of the extensive discovery that had been conducted, defendant was informed as to the nature of the claim for damages, and denied the defendant's motion based on these grounds. We held that no general damages were allowable under such circumstances. [See 37 F.R.D. 460].

At no point did plaintiff raise the contention prior to trial, despite extensive pretrial arguments, that the report imputed insolvency and was thus libelous per se. No innuendo was pleaded to this effect. On the eve of trial, plaintiff's counsel for the first time stated that he expected to argue and submit evidence that the report imputed insolvency and would require no proof of special damages because an imputation of insolvency is a libel per se. This was overruled by the trial court which found no such imputation. After hearing plaintiff's case the court dismissed plaintiff's action for failure of proof of special damages. The Court of Appeals reversed this decision and remanded for a new trial. [367 F.2d 625].

We take the following guidelines from the opinion of the Court of Appeals as the law of the case:

1. "The plaintiff's allegation that defendant had 'erroneously' reported to plaintiff's creditors that a large judgment had been entered against it was actionable per se. The complaint clearly states that plaintiffs credit was injured as a result of the publication." (p. 629.)

2. "We read the report as not only imputing inputing insolvency but demonstrating it: plaintiff's estimated liabilities (the liabilities column plus the $60,000 judgment) are reported as far exceeding its estimated assets. The report is, therefore, defamatory on its face." (pp. 630-631).

3. "Under these circumstances (the extent of pretrial discovery) and upon consideration of the liberalized pleadings effectuated by the Federal Rules, we hold that plaintiff's failure to attach to its complaint a copy of the report could not preclude it from arguing that the report demonstrated insolvency, nor can we perceive any prejudice to the defendant by plaintiff's belated assertion of imputed insolvency." (p. 631).

The controlling law here is the law of Pennsylvania. Generally, Pennsylvania law in this field follows the Restatement of Torts, § 558 et seq. The requirement of 3 Restatement, Torts, § 613, have been codified by statute in Pennsylvania.

"12 P.S. § 1584a Burden of Proof.

(1) In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

(a) The defamatory character of the communication;

(b) Its publication by the defendant;

(c) Its application to the plaintiff;

(d) The recipient's understanding of its defamatory meaning; * *".

The defamatory character of the communication has been established as a matter of law. Publication by the defendant and its application to the plaintiff is not contested. We then come to requirement (d) of the statute, the burden of proof on the recipient's understanding of the defamatory meaning.

Disposition of these questions in Pennsylvania follows the rule of 3 Restatement, Torts, § 614:

"TOPIC 2. FUNCTION OF COURT AND JURY.

§ 614. Determination of Meaning and Defamatory Character of Communication.

(1) The court determines whether a communication is capable of a defamatory meaning.

(2) The jury determines whether a communication, capable of a defamatory meaning was so understood by its recipient."

The Court, under Restatement, Torts § 614(1), must initially determine whether the publication complained of is capable of the meaning ascribed to it by the plaintiff and whether this meaning is capable of a defamatory interpretation. Restatement, Torts, § 614, Comment (b). Richwine v. Pittsburgh Courier Publishing Co., 186 Pa. Super. 644, 142 A.2d 416 [1958]. It

would seem, then, that the first part of this two part inquiry is a determination of innuendo.

> "The word 'innuendo' has been a source of great confusion in the law of defamation. Frequently, it has been improperly used *as the meaning of the inferences* which may be properly drawn from the words complained of. As stated in Sarkees v. Warner-West Corp., 349 Pa. 365, 367, 368, 37 A.2d 544, 546 (1944), repeating what was said in Naulty v. Bulletin Company, 206 Pa. 128, 55 A. 862, "The purpose of an innuendo, as is well understood, is to define the defamatory meaning which the plaintiff attaches to the words; to show how they come to have that meaning and how they relate to the plaintiff. Price v. Conway, 134 Pa. 340, 19 A. 687, 8 L.R.A. 193. * * *' " Cosgrove Studio & Camera Shop v. Pane 408 Pa. 314, 182 A.2d 751, 754 [1962].

The Court of Appeals having decided the inquiry under § 614(1) in favor of the plaintiff by finding that the communication in question was libelous per se, the jury had to decide whether the communication was so understood by its recipients in the defamatory meaning which the plaintiff argues for it. Whether or not an innuendo was required to be pleaded has no bearing on this second inquiry.

Under this rule the jury in this case was instructed to make the determination of whether the defamatory meaning which the law allows to such a publication, that is, the meaning of insolvency, was actually understood by the persons who received the report.

The plaintiff objected to such instruction and now opposes defendant's motion on the grounds that

no such instruction should have been given because libel per se requires no determination of the understanding of its defamatory meaning by the jury. With this we cannot agree. This is one of the essential elements of defamation. The clear language of the Pennsylvania statute imposes a burden of proving the understanding of the recipient upon the plaintiff.

In submitting this question to the jury the trial court followed both the Restatement rule and the decided cases in Pennsylvania. They repeat this requirement with unanimity and consistency.

In Weider v. Hoffman, 238 F.Supp. 437 [M.D.Pa. 1965], the court in reviewing this problem stated:

> "The court instructed the jury that such words on their face were capable of a libelous meaning. This was in accordance with the Restatement, Torts, § 614(1) which had been cited with approval by the Pennsylvania Supreme Court as defining the function of the court in libel cases, such as here, where 'the words are defamatory on their face.' * * * (citations omitted). The jury then was instructed that whether the words did in fact convey a libelous meaning to persons to whom they were communicated was for the jury to determine. This was in accordance with Restatement, Torts, § 614(2), which defines the function of the jury. Bocchicchio v. Curtis Publishing Co., E.D.Pa.1962, 203 F.Supp. 403; Bauseman v. Norristown Herald, Inc., 1945, 351 Pa. 634, 643, 41 A.2d 736. The function of the jury in determining whether a communication, capable of a defamatory meaning, was so understood by its recipient, would be a find-

ing with respect to a plaintiff's burden of proof as set forth in 12 P.S. § 1584a(1) (d, e), which appears to be an adoption of the Restatement, Torts § 613." (p. 441).

A similar rule was followed in Bocchicchio v. Curtis Publishing Co., 203 F.Supp. 403 [E.D.Pa.1962]:

"Both the Pennsylvania cases* and the Federal cases* binding on this court have held that, under Pennsylvania law, it is for the jury to determine whether a communication, capable of a defamatory meaning, was so understood by its recipient. See Restatement of Torts, § 614."

Bauseman v. Norristown Herald, Inc., 351 Pa. 634, 41 A.2d 736 [1945], the most frequently cited Pennsylvania authority, repeats the rule in almost identical language:

"It was for the court to say, as a matter of law whether the writings in suit were capable of a libelous meaning. If they were, it then became the jury's duty to determine whether they have such meaning in fact."

Therefore, the plaintiff must meet the burden of proof that the recipients understood the report in the sense that he argues for it, as showing that the plaintiff was insolvent. We believe that we must clearly distinguish that such an understanding must be derived from the erroneous item of the report, because there is no question of the truth of other items in the report which reflect serious financial problems faced by the defendant. Furthermore, this meaning must be found

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* (footnote citations omitted).

to have existed in the minds of the recipients, and not in the opinion of what other people may think that a recipient would construe it. "It is not competent, in an action of libel, to aid the innuendo by the mere opinion of a witness." Pittsburgh A. & M. Pass. Ry. Co. v McCurdy, 114 Pa. 554, 8 A. 230 [1887].

We must examine the evidence to determine whether, viewed in the light most favorable to the plaintiff, any recipient understood the report to mean that the plaintiff was insolvent in the sense that plaintiff argues, that the mistakenly reported judgment of $60,000 added to the estimated liabilities shown on the balance sheet, resulted in the report being interpreted by the recipient to mean that plaintiff's liabilities exceeded its assets. No recipient so testified. No witness who was either a recipient or who had received word of the report through its receipt by his employer testified to any such construction. The only mention of "insolvency" by plaintiff's witnesses came from the two financial experts called by plaintiff to explain the innuendo which plaintiff was trying to prove, but they were not recipients and they knew nothing about the reaction of any actual recipient.

Of the fifteen (15) possible recipients of the report only one actual recipient was called. Two other witnesses were not recipients, but were sales representatives of firms whose credit managers had received the report. They had heard of it, and one had seen it. None of these three construed the report to mean insolvency, none of them could testify to any construction placed upon it by their credit managers, and none of them could testify as to the motives of their credit managers.

The report was mailed January 9, 1963. Nothing happened to plaintiff in connection with or as a result of the report until April 10, 1963. At that time plaintiff's president was visiting Mr. Overdorff, of Quaker Sales, a supplier of plaintiff from which plaintiff held an exclusive sales agency. Overdorff had been complaining of plaintiff's delinquent account for a long time and he had advised plaintiff's president to borrow money to finance his working capital. Plaintiff's president had told him that the company had no assets to secure such a loan. Overdorff's reaction to the report was that the reported judgment indicated that the plaintiff corporation had in fact borrowed money to finance accounts payable but had not paid Quaker Sales anything on account. Plaintiff's president learned of the report in this way for the first time, and secured a correction from defendant to the subscribers on the next day of transacting business, but Quaker Sales continued to press him for the payment of its delinquent account. Quaker Sales did not deny plaintiff credit or cancel its exclusive sales agency. Nothing in Overdorff's testimony showed that he understood the report to mean that plaintiff was insolvent.

The second witness, Seibert, sales agent for Central Commercial, for whom plaintiff was a franchised dealer, testified that his firm had been having credit troubles with plaintiff in the preceding year, and that in the spring of 1963 the account was long past due. Central Commercial's Credit Manager had sent a letter to plaintiff on March 22, 1963, informing it that its credit would be limited to $5,000 and sixty days. This letter made no reference to the January 9, 1963 report of defendant, and the witness had no personal knowl-

edge of the motive for the letter. Plaintiff's account had been 90 days overdue in the year before, and was beyond the creditor's normal thirty day limit. It was shown that on April 11, 1963, on the day following the plaintiff's discovery of the existence of the report, Central Commercial's Credit Manager wrote to plaintiff firm asking for its explanation of the judgment reported on the January 9th report as well as the item on said report showing that plaintiff's firm had previously assigned all its accounts receivable to secure a loan from a bank. To this plaintiff did not reply.

The third witness, Johnson, was a salesman newly appointed in March 1963 for plaintiff's territory. His employer was Glen Gary Shale Brick Corp. for whom plaintiff was also a distributor. Plaintiff was also indebted to this firm, and in the previous year it had been warned of a sixty day limit. He testified that in March of 1963 he had been told to watch plaintiff's account by the credit manager because the account was over sixty days past due and the witness felt that any account over sixty days due was in jeopardy. This witness had seen the defendant's report of January 9 in March of 1963. He did not testify that he took it to mean that plaintiff was insolvent, but he felt that the entry of judgment, along with other factors, particularly the assignment of accounts receivable, made plaintiff firm "a little shaky." Plaintiff's exclusive agency for this firm was continued after the report, and plaintiff's credit terms of sixty days were beyond the normal thirty day term of Glen Gary.

No witness established any link between the credit report's mistaken entry of judgment and any subse-

quent action taken by their companies. The evidence that there was any cause and effect relationship was at best only inferential. These inferences may be construed either way from the report itself; the undeniably true statement of the credit report concerning the plaintiff's assignment of its accounts receivable was acknowledged to be a reason for any subsequent actions that were taken. The fact that no immediate reaction of any kind developed from the circulation of the credit report to creditors who did have cause to worry about the ability of plaintiff to pay his accounts negates any inference that any recipient understood the credit report to impute insolvency.

It is important to note the lack of evidence of proximate cause here. No recipient of the report pointed to the erroneous report of judgment as the cause of their actions. All were familiar with plaintiff's slowness in paying accounts. Typical of this failure to establish connection with the erroneous item was Seibert. He testified that Central Commercial placed credit restrictions in March 1963 on Altoona "because there was a bad credit report on them." (T. p. 226). Of course, this was hearsay as the following lines show, but plaintiff's proof rises no higher. But it was true that there was a bad credit report on plaintiff without regard to the erroneous entry. Both plaintiff's financial experts so testified. The true portions of the report showed insufficient working capital, inadequate quick assets, and the prior assignment of the bulk of quick assets, the accounts receivable, all of which would warn any credit manager.

Overdorff's reaction was that the erroneous item made him mad because he thought the judgment evi-

denced loan to pay delinquent accounts, and he had received no payment on his own delinquent account.

Johnson because acquainted with the account in March 1963, when he first took over the territory. He had been warned to watch it by his employer. It was over sixty days past due and he felt any account of this age was in peril. His knowledge of the actions of his credit manager is hearsay.

None of these witnesses establish a causal connection with the erroneous item, sufficient to prove proximate cause.

It is also noteworthy that credit restrictions were applied and continued after the erroneous item had been explained by defendant in its correction notice of April 15, 1963, while plaintiff continued to be further delinquent in payment, particularly before the beginning of a new construction season.

Pegnetter, the president of plaintiff, testified to other credit restrictions. His testimony is largely hearsay and speculation.

Pegnetter's testimony is at best circumstantial. Plaintiff's business was declining and continued to decline in sales. But the credit report was not shown to have been sent to the persons or firms to whom he sold, only to those from whom he bought. His capital was badly impaired; he had no working capital; he had assigned his accounts receivable, which were the only assets available for the payment of his current liabilities. In the midst of this history of business decline the subject credit report appears. Nothing happened thereafter which hadn't happened before. His creditors con-

tinued to press for payment at a time when building material supply houses make a special effort to get last year's construction season's accounts cleaned up before a new construction season begins.

Where circumstantial evidence is relied on by a plaintiff in a civil case, the evidence must outweigh in the minds of the fact finder any other evidence and reasonable inferences therefrom which are inconsistent therewith. Smith v. Bell Telephone Company of Pennsylvania, 397 Pa. 134, 153 A.2d 477.

Plaintiff produced two expert witnesses who testified on this subject. They were offered as experts on the nature of credit and its function in the business world, which we believe was proper in the light of plaintiff's allegations of loss of credit and its resulting damage to its business. However, they were asked as to their opinion of how a recipient, a credit manager, would interpret the report. Both testified that in looking at the report as a whole, and adding the noted judgment to the liabilities, a business man might come to the conclusion that the firm was insolvent. However, a credit manager, to whom these reports are addressed, would not draw this conclusion. Such testimony was not without extensive qualifications and testimony on the adverse effect of the other unfavorable financial information shown and the undeniably true report of assignment of accounts receivable, regardless of the mistaken report of the entry of judgment. We are convinced that it was prejudicial error on our part to allow these expert witnesses to testify as to their opinion of a state of mind of a recipient. See P. A. & M. Pass. Ry. Co. v. McCurdy, supra. We think that the error was highly prejudicial to

the defendant, because these were the only witnesses of the plaintiff who drew any imputation of insolvency from the report or who even used the word "insolvency" in their testimony.

On another aspect of the case, the plaintiff's pleading was found sufficient because it alleged that the report of judgment was erroneous and that the plaintiff suffered a loss of credit because of the erroneous report. The mere allegation of the erroneous report of entry of judgment alone is not actionable, it must be coupled with an allegation that plaintiff's credit was injured as a result thereof. (367 F.2d 629). Therefore, plaintiff was again under the burden of proving the allegation of loss of credit which made this report actionable. Again, viewing the evidence as a whole, there is no testimony that as a result of reading the erroneous report of judgment any subscriber refused to sell to plaintiff on credit. None of the plaintiff's creditors' firms so testified.

Plaintiff's credit continued under the same terms and the same notices as previously. He had been previously limited to sixty (60) days by warnings from creditors, he was given the same sixty (60) day warning after the report, he was delinquent more than sixty (60) days before the report, he had failed to keep promise of payment and had been denied delivery.

We, therefore, conclude that the finding of the jury was contrary to the great weight of the evidence on the questions of the effect of the report on its recipients, and the causal relation between the report and the consequences alleged.

Defendant is an agency engaged in the business of reporting financial information to subscribers

who request this service. The specific report in this instance was supplied to fifteen subscribers who had requested reports on plaintiff. Such reports have been held privileged, as was held in this case on prior appeal. (367 F.2d 625, 631). The reason for the privilege is that in furnishing information the agencies are supplying a legitimate business need, and that without the privilege few would undertake to furnish such information, and the cost thereof would be high, if not prohibitive. 15 Am.Jur.2d, Collection and Credit Agencies § 22. By statute in Pennsylvania, plaintiff has the burden of proof that defendant has abused the privilege. 12 P.S. § 1584a.

Taking all of the evidence and the inferences therefrom in the light most favorable to the plaintiff shows that defendant noted on the financial report concerning plaintiff the entry of a judgment which was in fact the obligation of another corporation of an almost identical name. Plaintiff produced evidence from two attorneys, expert in the field of searching titles to real estate, to show that had the defendant employed a person with the education and experience of a lawyer specializing in the search of records of title to real estate, there were notations on the index to the judgment dockets in the court house, from which the report was taken, that would indicate to a careful title searcher that he should inquire further in his search into the original documents to determine the exact identity of the person or the real estate bound by the judgment. It was also shown that defendant had in its own files information concerning the real debtor and the existence of this obligation against it.

Defendant argues that there was no evidence presented to establish the standard of care required of a credit agency and that the standard of care of a real estate title searching attorney could not reasonably be applied to the defendant. These experts did not establish a standard of care applicable to defendant's business, and to that extent their testimony is incompetent. Where expert testimony is relied upon to establish a standard of care required in a given situation, it must be directed to the knowledge, skill, and ability ordinarily possessed and exercised by members of the profession similarly situated. With respect to attorneys, this standard has been stated as:

> "He is not bound to exercise extraordinary diligence, but only a reasonable degree of care and skill, having reference to the character of the business he undertakes to do. Within this standard, he will be protected so long as he acts honestly and in good faith." 7 Am.Jur.2d, Attorneys at Law § 168.

The same standard has been applied in medical malpractice cases.

> "The physician must use such ordinary skill and diligence and apply the means and methods generally used by physicians and surgeons of ordinary skill and learning in the practice of the profession, i.e., in the same general line of practice in like cases to determine the nature of the ailment and to act upon his honest opinion and conclusions. Ward v. Garvin, 328 Pa. 395, 195 A. 885." McHugh v. Audet, 72 F. Supp. 394, 399 [M.D.Pa., 1947]; Duckworth v. Bennet, 320 Pa. 47, 181 A. 558 [1935].

There was no attempt on the part of the plaintiff to introduce evidence of the standard of care required of credit reporting agencies. In fact, the cases recognize that these agencies must be able to provide the business community with the required information economically and quickly, and the evidence demonstrated that exercising the standard of care of an attorney searching real estate titles would require a much larger expenditure of time and money. The testimony of the plaintiff's expert attorney witnesses was admissible to explain to the jury the meaning of the records which were relied upon by the defendant's reporter, but was not competent to establish a standard of care applicable to defendant sufficient to overcome the privilege.

The remainder of the evidence was directed to proof of negligent handling of the information in the light of other information that was available to defendant to show the incorrect designation of the judgment as being against plaintiff corporation. Even if we were to apply a standard of ordinary negligence to defendant's actions and even if we were to find that it was guilty of want of reasonable care under the circumstances, there is no doubt that the same evidence showed that plaintiff itself was guilty of contributory negligence which would defeat any recovery based on a standard of negligence as a matter of law.

The plaintiff's corporate name is:

"ALTOONA CLAY PRODUCTS, INC." The corporation was chartered in 1957 by the Commonwealth of Pennsylvania. It had purchased the good will, business accounts, sales franchises and miscellaneous personal property of a predecessor corporation known as "Brick

and Tile Sales Company," formerly known as "Altoona Clay Products Company, Inc." The original controlling stock in "Altoona Clay Products, Inc." was owned by Brick and Tile Sales Company and the first president of Altoona Clay Products, Inc., was the principal if not the sole stockholder of Brick and Tile Sales Company. The first business location of Altoona Clay Products, Inc. was the former business premises of Brick and Tile Sales Company, which continued to own this location. Brick and Tile Sales Company had been originally incorporated as "ALTOONA CLAY PRODUCTS COMPANY, INC." in 1926. In 1948, it purchased the business property where it was located, the deed of conveyance being made to "ALTOONA CLAY PRODUCTS COMPANY." In 1952, "ALTOONA CLAY PRODUCTS COMPANY" changed its corporate name to "Brick and Tile Sales Company." This change of corporate name was registered with the Pennsylvania Bureau of Corporations, and without such change no new corporation would have been granted a charter under the name of "ALTOONA CLAY PRODUCTS, INC." The Pennsylvania Business Corporation Law prohibits the incorporation of entities having deceptively similar names. 15 P.S. § 1202. Defendant would be entitled to rely on the fact that under Pennsylvania law there could be only one entity with the name "Altoona Clay Products" whether followed by the designation "Company" or "Inc.", one or the other of which words must appear in the corporate title under Pennsylvania law.

Brick and Tile Sales Company gave a mortgage and bond on its property. To conform to the record title the name of the obligor was listed as "Brick and Tile Sales Company formerly Altoona Clay Products Company".

When the bond accompanying this mortgage was entered in judgment, it was indexed under both names, and the index to judgments carried the entry in the docket index as "Altoona Clay Products Co. al" in the same column in the handwritten index as would be for an entry against "Altoona Clay Products, Inc." In fact, there were entries in the indexes to secured transactions in the same office under the name "Altoona Clay Products Company" that were actually the obligations of the plaintiff.

The record is replete with evidence that plaintiff had used the name "Altoona Clay Products Company" to designate itself. Even on the witness stand, the plaintiff's president, its witnesses, and its local counsel could not avoid repeating this error. This confusion of names was actually done by plaintiff corporation in numerous documents: the only financial statement ever furnished by plaintiff to defendant listed its name as "Altoona Clay Products Co."; captions of financing statements given to secured creditors for filing, signed by the plaintiff's president, carried its name as "Altoona Clay Products Company" and were so indexed on the court house records; plaintiff's president's own personal income tax returns showed his employer as "Altoona Clay Products Company, Inc."; the sales franchise from Central Commercial Company to plaintiff corporation was addressed to "Altoona Clay Products Company."

If the plaintiff's case on abuse of privilege is based upon negligent failure to distinguish between "Altoona Clay Products Company" and "Altoona Clay Products, Inc." in reporting a judgment, the evidence is overwhelming that the plaintiff's own actions in the treat-

ment of its corporate name were equally negligent, and contributed to this confusion.

We, therefore, come to the conclusion that any claim that defendant has abused its privilege because of its negligence must be defeated by the evidence of plaintiff's own negligence which contributed to the mistake.

Viewed at its best, the plaintiff's evidence shows a mistake in confusing deceptively similar names. What becomes of the privilege in the face of such a mistake? In Briggs v. Garrett, 111 Pa. 404, 2 A. 513, 521, 522 [1886], the Supreme Court of Pennsylvania held:

> "The difference between an honest mistake made in the pursuit of a proper object, and a willful falsehood coined for the purpose of deception, is so palpable that we may well be excused from dwelling upon it at length. It is mistakes, not lies, that are protected under the doctrine of privilege.
>
> A communication, to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made, in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel; actual malice must be proved before there can be a recovery. * * *
>
> Where the Communication is privileged, plaintiff must show that it was not true, and that defendant had no reasonable grounds to believe that it was true." (p. 414, p. 521 of 2 A.).

The Pennsylvania cases reviewing the privilege and the evidence necessary to overcome it have all

found some element in addition to the falsity of the report to be necessary to defeat the privilege. In O'Donnell v. Philadelphia Record Co., 356 Pa. 307, 51 A.2d 775 [1947], cert. den. 332 U.S. 766, 68 S.Ct. 74, 92 L.Ed. 351 [1947] there was evidence of a republication of the defamation after suit had been brought. The Court noted that the jury might have found this to be "* * * convincing evidence of wrong motive [and] actual malice." (51 A.2d p. 779). In Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167, 191 A.2d 662 [1963], the court used the terms "* * * reckless unconcern, culpable indifference and palpable irresponsibility * * *" to describe the conduct of a radio station in deliberately contriving a sensational "documentary" radio news report. Although the Court (p. 668) speaks in terms of "* * * want of reasonable care and diligence to ascertain the truth * * *", it also speaks [one line above] on legal malice arising from a "* * * reckless and wanton disregard of another's rights * * *". In Montgomery v. Dennison, 363 Pa. 255, 69 A.2d 520 [1949], the court recites "recklessness of consequences and a mind regardless of social duty * * *" in describing actions taken by the defendant solely on the basis of an anonymous communication, i.e., excessive publication and refusal to retract his statement after being told that it was not true (p. 528). In Diamond v. Krasnow, 136 Pa.Super. 68, 7 A.2d 65 [1939] the Court found that evidence of motivation in the circulation and the manner of publication of the false report (defendant was using the report to enforce a collection of its own accounts) was proper for the jury's consideration of, inter alia, presence of malice and absence of privilege. (p. 69).

Highly important in considerations of malice or wilful disregard of consequences is the evidence that defendant issued a correction upon the next available business day after learning of the error, after rechecking records and investigation of the Bureau of Corporations at the State Capitol to determine why there were two almost identical corporate names in existence. Such evidence rebuts any contention of actual malice, of which the evidence in this case is bare.

Analysis of these cases shows that any use by the Pennylvania Courts of "lack of reasonable care and diligence" cannot be interpreted as ordinary, or simple, negligence. The facts of the cases, the conduct of the defendants are clear examples of reckless and wanton conduct. The language used by the Courts must be read consistently with these facts. Malice is the test. Lack of good faith is an element thereof. Lack of reasonable care and diligence rising to the level of reckless and wanton conduct in the truth-searching process is sufficient to find malice and defeat the privilege.

Most recently, reviewing the decisions of the United States Supreme Court, the Court of Appeals for this Circuit has affirmed this standard.

> "Negligent failure to check the accuracy of statements in an advertisement and to discover misstatements therein, 'is constitutionally insufficient to show the recklessness that is required for a finding of actual malice'. New York Times Co. v. Sullivan, supra [376 U.S. 254, at pages 287-288, 84 S.Ct. 710, at page 730, 11 L.Ed. 2d 686 (1964)]. Otherwise stated, investigatory failures alone are insufficient to show recklessness on the part of a newspaper.

* * * * * * *

> Upon consideration of the evidence we are of the opinion that it fails to establish that the advertisement was published by the defendant with 'reckless disregard' as to whether the statements in it were true or false."
>
> Baldine v. Sharon Herald Co., 391 F.2d 703, 706-707 (3rd Cir., 1968).

With particular reference to the reports of mercantile reporting agencies it has generally been held that because of the business utility of such reports, their confidential nature, their limited distribution, and the necessity for speed in their preparation, their privileged character is not lost merely because the report contains false information or because the agency was negligent in its preparation of the report. 23 Am.Jur.2d, Collection and Credit Agencies §23; H. E. Crawford Co. v. Dun & Bradstreet, 241 F.2d 387 [4th Cir., 1957]; Petition of Retailers' Commercial Agency, 342 Mass. 515, 174 N.E.2d 376.

While New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 [1964] concerned a "public official", the decisions which followed it have broadened this concept to include "public figures", Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 [1967], and "public issues", Time Inc. v. Hill, 385 U.S. 374, 87 S. Ct. 534, 17 L.Ed.2d 456 [1967]. In the latter case the Supreme Court held:

> "* * * the guarantees for speech and press are not the preserve of political expression or comment upon public affairs * * * (and) 'must embrace all issues about which information is needed or appropriate to enable the members of society to cope with

> the exigiencies of their period.' Thornhill v. State of Alabama, 310 U.S. 88, 102, 60 S.Ct. 736, 744, 84 L.Ed. 1093."

The long established recognition of the necessity of quick credit information in our commercial society certainly includes defendant's activities as being in the interest of the business community within the sphere of the privilege.

A recent case in New York has extended the same privilege to comments in a news magazine about a diet food marketing concern:

> "Certainly the subject matter of the article, under review is of considerable public interest and it cannot be said of the conduct of the defendant with respect to motivation that the complaint meets the required standards. Certainly the intent here was not merely to injure through falsehood; rather the motivation was the protection of the public in the disclosure of a highly important matter affecting the public interest." All-Diet Foods Distributiors, Inc. v. Time, Inc., N.Y.Sup.Ct.N.Y.City, Jan. 2, 1968, Misc., 290 N.Y.S. 2d 445, Anno. 19 A.L.R.3d 1361, 1385.

Considering all of the evidence and the reasonable inferences to be drawn therefrom most favorably to the plaintiff, I conclude that as a matter of law that there is no evidence sufficient to support a finding that the publication was made with malice or a reckless disregard of its truth or falsity. At its highest probative force, the evidence showed that the report mistakenly confused the name of the plaintiff with an almost identical name of a predecessor in interest, a mistake which

was induced or contributed to in whole or in part by the repeated actions of the complaining plaintiff. This would constitute simple negligence, which we believe was an improper standard upon which to submit this question to the jury.

CONCLUSION

We conclude that this case fails in its proof. No recipient understood the libelous meaning which plaintiff alleges. Proof that any loss of credit was suffered as a direct and proximate result of the erroneous publication is lacking. There is no proof of damages, either special, by the jury's finding, or general in any amount more than nominal. The amount of general damages awarded is grossly excessive and shocking to the conscience of the court. There is insufficient evidence to overcome the legally established privilege of this communication that rises to a higher degree than ordinary negligence.

We are convinced that the verdict was based upon incompetent and prejudicial evidence and arguments injected into the trial.

Because the determination of these matters are primarily jury questions, we feel that the proper disposition requires a new trial.

ORDER

And now this 16th day of July, 1968, Defendant's Motion for Judgment in Accordance with Defendant's Motion for Directed Verdict is denied,

Defendant's Motion for New Trial is granted.

Appendix.

C. R. GROVE, Trustee, et al. and Altoona Clay Products, Inc., a corporation, Plaintiffs,

v.

DUN & BRADSTREET, INC., a corporation, Defendant.

Civ. A. No. 63-724.

(308 F. Supp. 1068)

UNITED STATES DISTRICT COURT,
W. D. PENNSYLVANIA.

Feb. 4, 1970.

OPINION

GERALD J. WEBER, District Judge.

Prior to the retrial of the above-captioned action the Court reviewed the action in the light of the subsequent development of the doctrine of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 [1964] in the cases of Times, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 [1967]; Curtis Publishing Co. v. Butts, and Associated Press v. Walker, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 [1967]; Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 [1968]; St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 [1968]; and other cases expanding that doctrine.

The recent decision of the Court of Appeals for the Third Circuit in Rosenbloom v. Metromedia, Inc. [September 15, 1969] 415 F.2d 892, further focused our attention to the treatment of the problem of defamation in the Circuit as well as in other courts of appeals.

Rosenbloom v. Metromedia, Inc., was a diversity case tried by the district court under the prevailing

controlling Pennsylvania law, submitted to the jury resulting in a verdict for the plaintiff.

In its review the Court of Appeals considered the application of state law to the case:

> "Although defendant contends to the contrary, we shall accept the district court's conclusion that certain of the statements in the two series were defamatory as a matter of Pennsylvania law and, in the circumstances, created a jury issue under such law." 415 F. 2d p. 894.

Similarly, in the instant case, the matter was submitted to the jury under controlling Pennsylvania law, but the court refused to find or to charge the jury that the case was controlled by the federal constitutional standard of "actual malice" as defined in Times v. Sullivan.

The Court finds and the plaintiff admits in its brief and argument on this point that there is no evidence of "actual malice" in this case sufficient to constitute a jury issue.

On argument called for by the court on this point the plaintiff contends that the application of the "actual malice" standard raises the question of whether this court is properly considering whether Pennsylvania's statutory standard for the action of libel is constitutional.

A similar point was considered in Cepeda v. Cowles Magazines and Broadcasting, Inc., 392 F.2d 417 [9th Cir., 1968], where the court of appeals had previously determined that a complaint stated an enforceable claim for libel under state law in 1964 and had remanded the

case for trial [328 F.2d 869] and later sustained the subsequent dismissal of the case by the district court under the New York Times v. Sullivan doctrine:

> "When the case was sent down from this court for trial in the district court, the normal situation would have been that the 'law of the case' announced by this court would have been, whether right of wrong, the law applicable to the trial in the district court. The district court wisely recognized that a higher law, that of the Supreme Court of the United States, had intervened after our decision and that the trial, if it was not to be a futility, must necessarily be had upon the basis of that higher law." 392 F.2d, p. 420.

The *Cepeda* case stated that "New York Times Co. v. Sullivan * * *, had, in 1964, preempted the law of libel as it related to public officials, making the outcome of such a suit dependent not upon state constitutions, statutes, and decisions, but upon the First Amendment to the Constitution of the United States and its interpretation by the Supreme Court."

Similarly, in this Circuit, the Court of Appeals has found the matter to be an accommodation between state law and constitutional standards:

> "It is our view that at least in the present factual text the proper accommodation between the First Amendment protections and the state law of defamation is found by requiring a plaintiff to meet the standard of proof formulated in *New York Times Co. v. Sullivan,* supra, i.e. that in order to recover damages here, plaintiff must prove that the statement was made with 'actual malice' * * *.

> In adopting the accommodation reflected in the actual malice standard we are not precluding plaintiff and others in similar situations from recovering in actions for defamation of character. We are merely establishing the quantum and type of proof required to permit recovery." Rosenbloom v. Metromedia, Inc., supra 415 F.2d at p. 896.

We turn to the question of whether the publication involved is entitled to the constitutional protection. The media here involved was a commercial credit report circulated to a limited number of subscribers who had particularly requested it. The constitutional protection is not limited to a particular form of media, whether printed matter, or radio, or television. Rosenbloom v. Metromedia, Inc. supra. The constitutional protection even extends to the writer of a letter on a matter of public interest, where the writing of the letter by a school board employee was made the grounds of dismissal from employment. Absent "actual malice" statements are under the First Amendment protection even though they otherwise support a state cause of action for libel, New York Times v. Sullivan, supra; criminal libel, Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 [1964]; invasion of privacy, Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534 [1967]; or discharge from public employment, Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 [1968].

What is the scope of the constitutional protection? It seems clear that the cases which have developed in the period since New York Times v. Sullivan, supra, all involve matters of real public interest. As stated in Rosenbloom v. Metromedia, "Again it is clear

to us that the subject matter was of real public interest. Indeed, the Supreme Court has construed broadly the concept of a matter or an issue of public interest:

> " 'The guarantees for speech, and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.
>
> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." Thornhill v. Alabama, 310 U.S. 88, 102, 60 S.Ct. 736, 744, 84 L. Ed. 1093.' Time, Inc. v. Hill, 385 U.S. 374, 388, 87 S.Ct. 534, 542, 17 L.Ed.2d 456 [1967]." 415 F.2d at p. 895.

The application of this principle has been evidenced by the widespread appearance of cases from both the state courts and the federal courts all over the country. See Fox v. Kahn, 421 Pa. 563, 221 A.2d 181 [1966] (oral statements on conduct of a district attorney); Sellers v. Time, Inc., 299 F.Supp. 582, [E.D. Pa., 1969] (sport's magazine comments on a negligence suit against an amateur golfer); United Medical Laboratories v. C.B.S., 404 F.2d 706 [9th Cir., 1968] (T. V. comments on prac-

tices of medical testing laboratories); Bon Air Hotel, Inc. v. Time, Inc., 295 F.Supp. 704 [S.D. Ga. 1969] (magazine comments on resort hotel accommodations); All Diet Foods Distributors, Inc. v. Time, Inc., 56 Misc.2d 821, 290 N.Y.S.2d 445 [N.Y.1967] (comments on health food sales in a book on nutrition); Farnsworth v. Tribune Co. [Sup.Ct..Ill., 1969] 253 N.E.2d 408, (newspaper publication on practices of an osteopathic physician). See also cases cited in Annot. Libel and Slander: Who is a Public Official or Otherwise within the Federal Constitutional Rule Requiring Public Officials to show Actual Malice, 19 A.L.R.3d 1361 and 1969 Supp.

Is the nature of the publication of mercantile credit reports within the scope of the constitutional protection? We think that the law has long recognized the utility of these publications. In the case at bar the privilege of the communication at issue was established as the law of the case by the court of appeals in its opinion, 3 cir., 367 F.2d 629. This privileged character of mercantile credit reports has a long history. "* * * there is a strong public policy giving rise to the privilege in the interest of society as a whole in availability of credit information." Serino v. Dun & Bradstreet, Inc., 267 F.Supp. 396 [D.S.C.1967].

Many of the previously cited cases have applied the federal constitutional standard to publications of wide circulation and dissemination, such as large metropolitan newspapers, national magazines, and radio and T. V. broadcasts, even where the party alleging defamation was known only to a limited public, because of the public interest in the subject matter. In the instant case we have the situation where the distribution of the publica-

tion, admittedly a matter of public interest, was distributed only to those having a special interest in the information and who had specifically requested such information. Long ago it was recognized that such a publication had a public interest.

> "Public interests will be adequately conserved by extending the immunity of privileged communications only so far as to embrace communications to subscribers who have special interest in the information." King v. Patterson, 49 N.J.L. 417, 9 A. 705, 712 [1887].

The court has raised this issue before trial on its own motion. The defendant pleaded this issue in an Amendment to its Complaint, before trial, and it was made a ground of its motion for judgment N.O.V. which we previously denied. As was stated in Bon Air Hotel, Inc. v. Time, Inc. 295 F.Supp. 704, 708 [S.D. Ga. 1969], in vacating a prior order denying summary judgment, "It is entirely possible that Judge Scarlett was correct in 1967 and wrong in 1969. This field of constitutional law is fast changing, rapidly developing and his order over-ruling the Motion may have become erroneous in the light of developments which make the actual malice test applicable here."

It appears proper to us that the serious constitutional question involved here should be resolved before we embark upon a trial of the issues which may be a useless procedure under our view of the controlling constitutional standard. Our prior order in this case denied the defendant's motion for judgment n.o.v. but granted the motion for new trial. A court at anytime before final decree may modify or rescind a prior interlocutory

order. Simmons Co. v. Greir Bros. Co., 258 U.S. 82, 88, 42 S.Ct. 196, 66 L.Ed. 475 [1922]. To secure an appealable final order we will vacate our prior order of July 16, 1968 denying defendant's motion for judgment n.o.v. and enter an order granting judgment to defendant in accordance with its motion for directed verdict and dismissing plaintiffs' action.

ORDER

And now this 4th day of February, 1970 it is ordered:

(1) That the Order of Court of July 16, 1968 denying Defendant's Motion for Judgment in Accordance with Defendant's Motion for a Directed Verdict is vacated;

(2) That Judgment be entered herein for Defendant in accordance with Defendant's Motion for Directed Verdict;

(3) That Plaintiffs' action is dismissed; and

(4) That the Order of Court of July 16, 1968 granting Defendant's Motion for a New Trial shall take effect only in the event that the ruling of the court on Defendant's Motion for Judgment is reversed on appeal.

Appendix.

C. R. GROVE, Appellant in No. 18756, Trustee, et al. and Altoona Clay Products, Inc., a corporation,

v.

DUN & BRADSTREET, INC., a corporation.

Appeal of Altoona CLAY PRODUCTS, INC., a corporation, in No. 18755.

Nos. 18755, 18756.
(438 F.2d 433)

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT.

Argued Oct. 30, 1970.
Decided Feb. 8, 1971.
As Amended March 15, 1971.

Before FOREMAN, SEITZ and ALDISERT, Circuit Judges.

OPINION OF THE COURT

ALDISERT, Circuit Judge.

This protracted libel action is again before us requiring that we determine whether the constitutional standard first enunciated in New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L. Ed.2d 686 (1964), extends to private subscription credit reports and whether there was sufficient evidence to support the jury's verdict. Following a $110,000 verdict for the plaintiff, the district court first granted defendant's motion for a new trial and subsequently entered judgment n.o.v. in favor of the defendant. This appeal followed.

Plaintiff, a Pennsylvania corporation engaged in the brokerage of bricks and tile, brought this diversity

action against Dun & Bradstreet, a mercantile agency which supplies credit reports to its subscribers. Alleging libel of its business reputation, plaintiff sought damages emanating from the issuance of a false credit report in 1963. At the first trial plaintiff was limited to proof of special damages and a verdict was directed for defendant, Altoona Clay Products, Inc. v. Dun & Bradstreet, Inc., 246 F.Supp. 419 (W.D.Pa. 1965). This court reversed, 367 F.2d 625 (3 Cir. 1966), holding that under Pennsylvania law the publication was libel per se and hence actionable without proof of special damages, but that proof of special damages should, in any event, be submitted to the jury. On remand, the jury awarded only general damages in the amount of $110,000. In a lengthy opinion, the trial court denied defendant's motion for judgment n.o.v., but granted a new trial concluding that proof was lacking that (1) the recipients of the report understood its libelous nature; (2) plaintiff's loss of credit was a direct and proximate result of the erroneous publication, and (3) damages were more than nominal, 286 F.Supp. 899 (W.D.Pa. 1968). Thereafter, the court, in light of subsequent cases involving the *Times* doctrine, including this court's decision in Rosenbloom v. Metromedia, Inc., 415 F.2d 892 (3 Cir. 1969), cert. granted 397 U.S. 904, 90 S.Ct. 917, 25 L.Ed.2d 85 (1970), *sua sponte* vacated its new trial order and entered judgment for the defendant "to secure an appealable final order." The court believed it "proper * * * that the serious constitutional question involved here should be resolved before we embark upon a trial of the issues which may be a useless procedure under our view of the controlling constitutional standard."

Appendix.

I.

Defendant periodically issued reports on the plaintiff, which was itself a subscriber to defendant's services. A report issued in January, 1963, included, in addition to the routine assessment of plaintiff's assets, liabilities, and overall rating,[1] a notation that a confession of judgment in the penal sum of $60,000 had been entered against it. In fact, the judgment had been entered against "Altoona Clay Products Company, Inc.," a predecessor to plaintiff's business, but nonetheless a separate corporate entity. Defendant's investigative agent had failed to note the distinction and the erroneous publication resulted. The standard by which this conduct is to be judged is indeed critical to plaintiff's action; clearly no test requiring "actual malice" can be satisfied by these operative facts.[2]

New York Times v. Sullivan concluded that "the

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1. All of defendant's subscribers are furnished a rating card which approximates the overall financial strength the subject is deemed to enjoy. Plaintiff's rating was E-3½, which imputed a strength of $20,000-$35,000, with limited credit standing.

2. Defendant presses the argument that the precise behavior before us—investigatory error — has been deemed constitutionally insufficient to support an action governed by *Times* and subsequent cases. We do not quarrel with that statement. See New York Times, *supra*. 286-288, 292 84 S.Ct. 710; Garrison v. Louisiana, 379 U.S. 64, 73-75, 79, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). This court has held that "investigatory failures alone are insufficient to show recklessness on the part of a newspaper". Baldine v. Sharon Herald, 391 F.2d 703, 706 (3 Cir. 1968). We recognize, therefore, that if the governing standard in this action be the *Times* rule, plaintiff's case must fail.

constitutional guarantees require * * * a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279, 84 S.Ct. at 726 (1964). The *Times* rule "preempted the law of libel as it related to public officials, making the outcome of such a suit dependent not upon state constitutions, statutes, and decisions, but upon the First Amendment to the Constitution of the United States and its interpretation by the Supreme Court." Cepeda v. Cowles Broadcasting, Inc., 392 F.2d 417, 420 (9 Cir. 1968).

In Time, Inc. v. Hill, 385 U.S. 374, 388, 87 S.Ct. 534, 542, 17 L.Ed.2d 456 (1965), the Supreme Court held that "[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs" and declared the constitutional privilege to "embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." In the companion cases of Curtis Publishing v. Butts (Associated Press v. Walker), 388 U.S. 130, 87 S.Ct. 1975, 18 L. Ed.2d 1094 (1966), these protections were extended to publications concerning "public figures." The burden of demonstrating "actual malice" was thus no longer limited to plaintiffs holding "a position in government [which] has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it." Rosenblatt v. Baer, 383 U.S. 75, 86, 86 S.Ct. 669, 676, 15 L.Ed.2d 597 (1965). Thus those who thrust themselves, either through politi-

cal action or other activity which invokes public interest or concern, into the public limelight, may no longer find redress in the courts for alleged defamations occurring in the media, without at least a showing of "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968); Curtis Publishing Co. v. Butts, *supra;* Garrison v. Louisiana, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964); Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 274 N.Y.S.2d 877, 221 N.E.2d 543, remanded on other grounds, 387 U.S. 239, 87 S.Ct. 1706, 18 L.Ed.2d 744 (1966.)

Noting in *Butts, supra,* 388 U.S. at 152, 87 S.Ct. at 1990, "the basic theory of libel has not changed," and crystallizing the competing concerns of the First Amendment and "society's 'pervasive and strong interest in preventing and redressing attacks on reputation,' Rosenblatt v. Baer, *supra,* 385 U.S. at 86, 86 S.Ct. 669," Justice Harlan cautioned, however, that

> to take the rule found appropriate in *New York Times* to resolve the 'tension' between the particular constitutional interest there involved and the interests of personal reputation and press responsibility * * * as being applicable throughout the realm of the broader constitutional interest, would be to attribute to this aspect of *New York Times* an unintended inexorability at the threshold of this new constitutional development. In Time, Inc. v. Hill, *supra.* [385 U.S.] at 390, [87 S.Ct. 534], we counseled against 'blind application of *New York Times v. Sullivan*' and considered 'the factors which

arise in the particular context.' Here we must undertake a parallel evaluation. 388 U.S. at 148, 87 S. Ct. at 1987.

To extend a privilege to defendant's publication greater than that afforded by traditional Pennsylvania libel law, then, we must determine if the facts before us involve a "public figure" or an issue of "real public interest," Rosenbloom v. Metromedia, *supra,* 415 F.2d at 895.

While we do not here decide whether a corporation is capable of status as a public figure, we hold first that plaintiff is not a public figure within the meaning accorded that term by the foregoing Supreme Court decisions. Not unaware of the difficulty in characterizing plaintiff as a public figure, defendant strenuously urges, therefore, that the issue here is one of legitimate public concern, rendering "the absence of a public figure of [no] controlling importance." *Rosenbloom, supra,* 415 F.2d 892 at 896.

Defendant asserts that plaintiff's credit is a "matter of interest to a segment of the public, viz., its suppliers, creditors, architects and public contractors." In support of this contention, defendant notes that plaintiff is a corporation chartered to do business by the Commonwealth of Pennsylvania, and that, in furthering the purposes of this corporate charter, plaintiff periodically involves itself in public projects, including sewerage treatment plants, public school buildings, post offices, public utilities, shopping centers and churches.

We cannot accept the theory that plaintiff's business or credit standing is a matter of "real public interest." It may generally be true that "the modern busi-

ness corporation by virtue of its pervasive influence on the political, economic, and social aspects of American life, has necessarily become a subject of public concern to the extent that the critics of its operations and behavior must enjoy constitutional protection for erroneous statements made without actual malice."[3] but those cases which have required that corporate plaintiffs meet the more difficult constitutional quantum of proof have all involved corporations engaged in activities of real public interest, and are grounded in that distinction.[4]

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3. Libel and the Corporate Plaintiff, 69 Col.L.Rev. 1496, 1505 (1969).

4. United Medical Laboratories v. C. B. S., 404 F.2d 706, 711 (9 Cir. 1968):

> The crucial question here then is whether First Amendment immunity can properly be regarded as extending to disclosure and discussion of professional practices and conditions in the health area involved, so that those engaged in the particular field who may claim to have been stained by such a publication will be subject, in any seeking of redress, to application of the federal standard for defeasance of the Amendment immunity, instead of to the standards of state libel law for recovery.

BonAir Hotel, Inc. v. Time, Inc., 295 F.Supp. 704 708 (S.D.Ga.1969):

> [I]n bringing to light the exorbitant prices charged for accommodations during the [Masters'] Tournament the article possessed a valid public interest in its subject-matter which, apart from any other consideration, brings defendants within the constitutionally protected area of free expression.

See also Arizona Biochemical Co. v. Hearst Corp., 302 F.Supp. 412 (S.D.N.Y. 1969); All Diet Food Distributors v. Time, Inc., 56 Misc.2d 821, 290 N.Y.S.2d 445 (Sup.Ct. 1967).

We are not here dealing with a publication or broadcast alleging, for example, that plaintiff caused sub-standard building material to be used in these projects. Such operative facts might constitute a matter of grave public interest. Our research discloses no case, however, which would support the application of the more rigorous standard to the covert reportage of the credit standing of a small brick and tile brokerage firm, and we decline to do so now.

In the view we take of this case, moreover, there is a more fundamental flaw in defendant's attempt to clothe itself in the protective cloak of the *Times* standard. Based on a thorough review of the cases interpreting and applying the *Times* doctrine, we hold that the defendant's publication is not a medium entitled to that extended constitutional protection. We reaffirm our conclusion in *Rosenbloom* that "no rational distinction can be made between radio and television on the one hand and the press on the other in affording the constitutional protection contemplated by the First Amendment," 415 F.2d 892 at 895. We find such a distinction patent, however, between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience. To be sure, defendant's publication is not held out for public consumption. By contractual stipulation, each subscriber agrees that

> [a]ll information whether printed, written or oral, submitted in answer to regular or special inquiry or voluntarily furnished to the subscriber by Dun & Bradstreet, Inc., is for the exclusive use of the subscriber. *Such information shall be held in strict confidence and shall never be revealed or made acces-*

sible in any manner whatever to the persons reported upon or to any others. (Emphasis supplied.)

As the court noted in denying a motion to dismiss in Packaging Industries, Inc. v. Dun & Bradstreet, 67 Civil 4638 (S.D.N.Y.1969), a case strikingly similar to this action:

> [T]his defendant, for a fee, presents private clients with a confidential report. It comes before this court in a situation quite unlike that of the defendants in *Sullivan* and *Butts*. It has not assumed the role of informing the public at large; pursuant to its own requirement confidentiality must be maintained. The application of a special privilege to this case would be an extension well beyond the limits previously established.

The confidential nature of these reports further underscores the inapplicability of the *Times* doctrine. In the *Butts* case, Justice Harlan characterized *Times* as resting on "the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest government policy," 388 U.S. 130 at 153, 87 S.Ct. 1975, at 1990. Justice Harlan was persuaded that Mr. Butts and General Walker "both * * * had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements." *Id.* at 155, 87 S.Ct. at 1991. Plaintiff here is denied that opportunity to respond to such false assertions both because it lacks the very access to the medium which *Times* and its progeny assumed, and for the more pernicious reason that the source or nature of the assertions may never be exposed.

Nor can defendant's reports be characterized as opinion, comment, or criticism. Their efficacy and value depend on their factual nature, and though there be a conditional privilege under the law of most states regarding the dissemination of news and opinion, some three-fourths of the courts which have recognized the privilege delineate a distinction in the case of false assertion of fact.[5]

We find that the lower court was eminently correct in its broad construction of the concept of "real public interest"; yet its mistaken reliance on *Rosenbloom* merely emphasizes why the standards applied there are inapposite here:

> "One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. * * * 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' Thornhill v. Alabama, 310 U.S. 88, 102, 60 S.Ct. 736, 84 L. Ed. 1093." Time, Inc. v. Hill, 385 U. S. 374, 388, 87 S.Ct. 534, 542, 17 L.Ed.2d 456, 415 F.2d at 895.

One can no more merely "pick up" one of defendant's reports, even when he is himself its subject, than he can participate in "freedom of discussion" about its contents.

We hold, therefore, that the doctrine of New York Times v. Sullivan does not extend to private subscrip-

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5. Prosser on Torts, 814 (3rd. Ed.).

tion credit reports, and that any allegations of defamation concerning such reports are properly subject to the libel laws of the several states.

II.

The district court directed that its original order of July 16, 1968, granting defendant's Motion for a New Trial, take effect only in the event that we reverse the February 4, 1970, order granting judgment n. o. v. for the defendant.

It is settled in this circuit that motions for new trial are addressed to the sound discretion of the district court and, ordinarily, its disposition of such motion will not be disturbed, Wagner v. Pennsylvania R. Co. 282 F.2d 392 (3 Cir. 1960), except in exceptional cases. Silverii v. Kramer, 314 F.2d 407 (3 Cir. 1963). In Lind v. Schenley Industries, 278 F.2d 79, 90 (3 Cir. 1960), the trial court had entered judgment for defendant and granted a conditional new trial. In reversing, and finding that the district court had abused its discretion in conditionally granting the new trial motion, Judge, then Chief Judge, Biggs stated: "the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury"; in this situation, "[i]t then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision" than when the issue is not the weight of the evidence but only trial error. See also Lewin v. Metropolitan Life Insurance Co., 394 F.2d 608 (3 Cir. 1968). Because the weight of the evidence was the issue critical to the district court's conditional grant of a new trial in the case before us, we

shall "exercise a closer degree of scrutiny" in determining whether there has been an abuse of discretion.

Although defendant continues to raise several arguments regarding the issues of actionability, libel per se as distinguished from libel per quod, the defamatory nature of the report, malice, plaintiff's solvency, and contributory negligence, each was disposed of by this court in our earlier opinion in this case, 367 F.2d 652 (1966).[6]

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6. After a thorough review of the applicable Pennsylvania law, this court, speaking through then Chief Judge Staley concluded:

> The publication in question being defamatory on its face and of such a nature that proof of special damages is unnecessary, the plaintiff is entitled to recover unless the defendant can establish either the defense of truth or privilege. Cosgrove Studio and Camera Shop, Inc. v. Pane, 408 Pa. at 317. 182 A.2d at 753, 367 F.2d 625, 631.

As we noted, though there be a privilege under Pennsylvania law, "want of reasonable care and diligence to ascertain the truth, before giving currency to an untrue communication, will destroy the privilege." O'Donnell v. Philadelphia Record Co. 356 Pa. 307, 51 A.2d 775, 367 F.2d 625, 631. The court below charged the jury with these very words. We remanded this case for a jury determination of whether defendant's agent was negligent in his investigation. Since defendant raises no challenge to the court's instruction as to what constitutes negligence under Pennsylvania law, we accept plaintiff's argument that "these instructions fairly stated the law and there is no reason to believe that the jury did not follow and apply them to the testimony in the case, when it awarded plaintiff a verdict of $110,000 for general damages." See citations in our earlier opinion. 367 F.2d 625, 631-632.

We will discuss, therefore, only the question of the sufficiency of plaintiff's evidence to support the damage award of $110.000.[7]

Plaintiff was not financially stable in the years immediately prior to the publication of the defamatory report. Gross sales had declined every year from 1958 to 1963. Losses and liabilities mounted. The limited assets of this closed corporation were of dubious value. From this evidence the district court concluded that no more than nominal damages were possible. We disagree. A business in an economically precarious position may well suffer greater damages as a result of the issuance of a defamatory credit report than would a financially sound corporation whose credit would not otherwise be open to question.

Severe credit restrictions were imposed upon plaintiff by its suppliers which foreclosed from plaintiff's

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7. Chief Judge Staley also concluded:

> Since this case will be remanded for a new trial, we must point out that we cannot concur in the district court's conclusion that plaintiff's proof on the issue of damages was insufficient. Though plaintiff's proof was far from conclusive [partly due to the improper exclusion of testimony by plaintiff's president], in light of the Pennsylvania cases, especially those cited by the district court, we believe it was sufficient for the jury's consideration. *Cf.* Dun & Bradstreet, Inc. v. Nicklaus, 340 F.2d 882 (C.A.8, 1965).

Since the proofs were largely the same at the two trials, we might well view our prior holding as dispositive of the insufficiency claim as well. Nevertheless, if only because of the disparity of results between the two trials, we choose to review briefly the sufficiency question again.

reach several anticipated lucrative contracts. Suppliers Glen Gery Shale Brick Corporation, Metropolitan Brick Company, Alliance Clay Products Company, and Central Commercial Company all rescinded, within the three months immediately following the issuance of the report, previously unrestricted credit standing, or insisted, for the first time, that there be strict compliance with previously unenforced credit terms. Credit ceilings of $5,000 were established, with 60, or, in some cases, only 30 days to remit. Glen Gery alone provided approximately 40% of plaintiff's brick supply. Three weeks after restricting plaintiff's credit, Central Commercial referred specifically to the report and the judgment in a letter to plaintiff.

Restriction of credit is damaging to any business. But the *modus operandi* of plaintiff, a brokerage firm, rendered such limitations fatal. T. D. Pegnetter, plaintiff's president, testified that

> because I was doing large construction jobs, servicing large jobs out of that plant, and * * * the contractors were slow, we had a slow turnover of accounts receivable, so naturally our accounts payable would get sixty to ninety to a hundred twenty days behind.

Q. And were you in a position to pay off the company such as Glen Gery, or were you required to rely upon credit?

A. I had—the whole business was—I had to rely on credit, not just Glen Gery, but the whole business had to rely directly on credit.

Pegnetter testified that Quaker Sales Company, which had granted an exclusive distributorship to plain-

tiff terminated its business relationship with plaintiff in reliance on the report. Pegnetter testified further that Elvin Overdorff, Jr., president of Quaker Sales, accused him of lying when he repeatedly denied the outstanding judgment. It was through Overdorff that Pegnetter first learned of the existence of the report. Overdorff demanded all the cash plaintiff had on hand and a note payable at $500 per month for the balance of the $11,000 which plaintiff owed Quaker.

Correction of the report by defendant did not restore the various creditors' confidence in plaintiff; the 30 and 60-day, $5,000 credit lines were retained. Plaintiff testified as to several major contracts which it "missed because of the credit restrictions."[8] Forced into receivership in early 1964, plaintiff was deprived of future profits. Moreover, plaintiff introduced testimony that sale of the company's tangible assets by the receiver resulted in a $26,000 loss from fair market value.

The jury's award is not rendered fatal because it exceeds the demonstrated substantial specific damages reflecting a decrease in trade or loss of profits. Indeed, the court charged that less tangible injuries were equally compensable:

> the items which are considered in support of such a claim of general damages are the damages to its business reputation, the decrease in trade or business suffered, loss of profits, and the general pecuniary harm which would normally result from such a publication.

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8. Plaintiff adduced testimony concerning ten specific projects in which the aggregated anticipated profits, calculated at 15% of the contract sale prices, would total at least $19,500.

Whether the aggregate of plaintiff's damages should have reached $110,000 is not within our province — nor that of the district court — to determine. Pennsylvania statutorily vests the jury with that power of evaluation where neglicence or malice is show in civil libel cases.[9] While it is true that data supporting all the items within the penumbra of general damages is not identifiable, this is not unusual in cases predicated on negligence. For example, in the run-of-the-mill personal injuries case, the recoverable items with respect to loss of wages, past medical expenses, and loss of future earnings reduced to present worth are easily discernible. The more abstract damages reflecting pain, suffering, and inconvenience — past, present and future — are generally not reflected with mathematical precision in the record. And in many cases an analysis of jury awards discloses that the bulk of the verdict is attributable to this particular item.

Thus, in the instant case, the jury had for its consideration, in addition to loss of trade and profits, the damage to appellant's business reputation and "the general pecuniary harm which would normally flow from such a publication." The inclusion of these items for jury consideration was not questioned at trial or on appeal. "[A]s this Circuit has frequently reiterated, while an award may be high, it should stand if there is ample evi-

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9. 12 Purd.Stat.Anno. § 1583:

In all civil actions for libel, no damages shall be recovered unless it is established to the satisfaction of the jury, under the direction of the court as in other cases, that the publication has been maliciously or negligently made, but where malice or negligence appears, such damages may be awarded as the jury shall deem proper.

dence to justify it. It is not [the] prerogative [of the court] to arbitrarily substitute [its] judgment for that of the jury." Fabrizi v. Griffin, 162 F.Supp. 276, 279 (W.D.Pa.1958).

On the basis of all the evidence, we conclude that the damage award was not without sufficient support.

In light of our prior opinion in this case, we find no merit in defendant's assertion that it was error to admit the testimony of two expert witnesses to show how the report was received.[10] Finally, we reject defendant's contention that plaintiff's summation was prejudicial; moreover, because no exception was taken until motion was made for a new trial, the objection was, in any event, untimely. Giffin v. Ensign, 234 F.2d 307, 316 (3 Cir. 1956); Fabrizi v. Griffin, *supra*.

Accordingly, the order of the District Court filed February 4, 1970, will be reversed, including that portion of the said order which granted a conditional new trial, and the cause will be remanded for entry of judgment in favor of plaintiff in accordance with the verdict of the jury.

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10. See note 6, *supra*. In any event, we find that the admission of this testimony was not error. Interpreting credit reports may be so esoteric as to be beyond "the range of ordinary training, knowledge, intelligence and experience," Commonwealth v. Kaufman, 182 Pa. Super. 197, 203, 126 A.2d 758, 761 (1956), to render expert testimony on the subject admissible. And "the fact that the opinions [may be] in reference to the ultimate issue to be decided by the jury does not bar them, if otherwise admissible: Cooper v. Metropolitan Life, 323 Pa. 295, 302-303, 186 A. 125," Lott v. Peoples Nat. Gas Co., 324 Pa. 517, 527, 188 A. 582, 586 (1937).

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18,755 and 18,756

ON APPEAL FROM THE

C. R. GROVE, Trustee, et al. and
ALTOONA CLAY PRODUCTS, INC.,
a corporation

v.

DUN & BRADSTREET, INC., a corporation

ALTOONA CLAY PRODUCTS, INC., a corporation,
Appellant in 18,755

C. R. GROVE, Appellant in 18,756

(D. C. Civil Action No. 63-724)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: FORMAN, SEITZ and ALDISERT,
Circuit Judges

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed February 4, 1970, be, and the same is hereby reversed, including that portion of the said order which granted a new trial, and the cause remanded for entry of judgment in favor of plaintiff in accordance

with the verdict of the jury, all in accordance with the opinion of this Court. Costs taxed in favor of appellants.

Attest:
THOMAS F. QUINN
Clerk

February 8, 1971

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18,755 and 18,756

C. R. GROVE, TRUSTEE, et al.
v.
DUN & BRADSTREET, INC., etc.

ALTOONA CLAY PRODUCTS, INC., etc.,
Appellant in No. 18,755

C. R. GROVE, Appellant in No. 18,756

Sur Petition For Rehearing

Present: HASTIE, *Chief Judge,* and FORMAN, *FREEDMAN, SEITZ, VAN DUSEN, ALDISERT, ADAMS, GIBBONS and ROSENN, *Circuit Judges.*

The petition for rehearing filed by
DUN & BRADSTREET, INC., Appellee

in the above entitled case having been submitted to the judges who participated in the decision of this court and

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*Although Judge Freedman died on March 13, 1971 he had previously participated in the vote in this matter.

to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
RUGGERO J. ALDISERT,
Judge

Dated: March 15, 1971

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18,755 and 18,756

C. R. GROVE, TRUSTEE, et al.
v.
DUN & BRADSTREET, INC., etc.

ALTOONA CLAY PRODUCTS, INC., etc.,
Appellant in No. 18,755

C. R. GROVE, Appellant in No. 18,756

Present: FORMAN, SEITZ and ALDISERT, *Circuit Judges*

It is ORDERED that the slip opinion be and the same is amended as follows:

Page 11, second paragraph, line eight: delete "previously unrestricted credit standing" and substitute therefor "previously unrestricted credit standing or insisted, for the first time, that there be strict compliance with previously unenforced credit terms."

Page 11, second paragraph: delete last sentence and substitute therefor "Three weeks after restricting plaintiff's credit, Central Commercial referred specifically to the report and the judgment in a letter to plaintiff."

Page 12, first full paragraph. Begin the first sentence with: "Pegnetter testified that . . ."

By the Court,
RUGGERO J. ALDISERT,
Circuit Judge

Dated: March 15, 1971

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix.

Excerpts from the District Court's Charge to the Jury on Damages (Record of the Court of Appeals, 1375a-79a, 1382a-83a)

We now come to a discussion of the damages claimed by plaintiff. The fact that we discuss damages is not to be taken as an indication that damages must be awarded, or that any particular type or amount is to be awarded; we discuss it because we must give you the controlling law on all aspects of the case. You are to consider damages only after you have come to a conclusion on the matters previously covered.

To the extent that you find that this report of the defendant carried the imputation that the plaintiff was insolvent and that the persons receiving the report understood it as meaning that the defendant was insolvent, and to the extent that you find that the defendant abused the privilege given to mercantile reports, you may consider the claim of general damages.

The law presumes that general damages result to a business concern from such a publication. The amount of such damages, however, must be established by evidence in support of the presumption, although the plaintiff is not required to prove the specific amount. General damages should not be disproportionate to the libel and the extent of its publication. The items which are considered in support of such a claim of general damages are the damages to its business reputation, the decrease in trade or business suffered, loss of profits, and the general pecuniary harm which would normally result from such a publication. These are compensatory damages, that is an award to make good the loss or harm which the defamatory publication would normally cause.

It is not necessary for the plaintiff to prove any specific harm to its business reputation or any other loss caused thereby. You must remember that the plaintiff is a business corporation, not an individual, and in considering the damage to its reputation we are considering the economic harm suffered by it, and the extent and duration of such economic harm. In making such a decision you must consider what the economic reputation of the corporation was before the publication, and the extent to which that economic reputation was harmed by the publication.

The second class of damages which the plaintiff claims here are called special damages. Special damages are those which cover a specific item of loss suffered by the plaintiff corporation as a result of the publication. The burden of proof here rests upon the plaintiff to prove these specific items. Where special damages are claimed, it rests upon the plaintiff to prove these items with reasonable certainty and to establish the causal connection between the publication and the special damages claimed. Even though the words may be defamatory on their face and sufficient to entitle the plaintiff to an award for general damages, the plaintiff may recover special damages only on those items which he has shown with reasonable certainty, both as to amount and as to connection with the publication.

Reasonable certainty does not require strict proof and the plaintiff should not be barred from such recovery by the difficulty of making accurate determination. Any such award of special damages is to be made for special items of loss shown, and should not duplicate any award of general damages.

You will recall that plaintiff's president testified as to certain lost sales opportunities which he considered that he had a reasonable chance of securing. You must consider whether this testimony meets the test of reasonable certainty, that is, that the plaintiff corporation had a reasonable certainty of making these sales, or any of them, or whether this is mere speculation. If you find that there was reasonable certainty that he would have made these sales and that the loss of the sales was directly traceable to defendant's publication, then you may consider this loss as an item of special damage.

Plaintiff testified what his markup on these sales was normally, but you must also remember testimony from the sales representative of the brick company as to the price reductions which sometimes had to be made to meet competition, or their refusal to lower prices. The damages to which plaintiff would be entitled in consequence of proof of such items of special damages are the loss of net profit which the corporation actually suffered, after considering all of their overhead, as well as the cost of the material and the cost of transportation.

The evidence has shown the margin of profit of the corporation on gross sales in the years in which the corporation did make a profit. Proof of loss of profits from particular sales in support of a claim for special damages must be supported with reasonable certainty. You may consider whether or not the business had been conducted at a profit for a sufficient length of time and with such an established trade that profits could be reasonably ascertainable.

In considering damages of any kind, the jury must make a determination of the cause of those damages, for no damages can be awarded except those that have been caused by defendant's actions. As for the general damages, the law aids the plaintiff in carrying the burden of proof by creating a presumption that a libel, which is defamatory on its face, such as a report of insolvency which is not privileged, will create damages. The law does not say how much damages, and the plaintiff may introduce evidence to support and aid this presumption. Special damages, as we have stated, must be shown with reasonable certainty, and the cause of such damages must be shown. No damage can be awarded unless it has been shown that the publication was a substantial contributing factor in producing them.

* * * * * * * *

If you make a finding for the plaintiff you must consider the elements that we have considered as to general damages and special damages. Remember what we have said about each of those. Do not confuse or do not duplicate the awards. We have therefore placed two notations here, "General damages" and some dots, after a dollar sign, and "Special damages" and you will indicate on your verdict, if you find for the plaintiff, what the amount of those or either of them are. You must recall from our charge that of course they do not necessarily follow one another; each is to be considered separately and the criteria which we have indicated applied to each of those.

* * * * * * * *

Dun & Bradstreet Report (5)

RATING UNCHANGED

SIC	NAME & ADDRESS	STARTED	RATING
50 98	AD 16 JAN 9 1963 N ALTOONA CLAY PRODUCTS, INC JOBBERS	1959	E 3½

312 UNION AVENUE
ALTOONA PA BLAIR COUNTY

TRADE

On Oct 19 1962 one supplier reports extending high credit of $15,500; owes $7,300; $5,600 past due; terms 3-10-25 net 30; prompt to slow payments, sold for over three years to 10-62.

CONDITION

On Jan 7 1963 officers absent and office secretary declined all information. Outside sources estimated:

Cash	$ 4,200	Accts Pay	$ 35,000
Accts Rec	77,000	Notes Pay	28,000
Mdse	11,000	Owe bank	8,000
Fixt & Equip	9,000	Accruals & Taxes	5,000
		Mtge	10,500

Volume for 1962 comparable to that of the previous year. Receivables heavy and slow turning and limit cash funds.

A check of the Blair County Records on Jan 7 1963 revealed a judgment filed by the Altoona Central Bank #280 term 10-61 dated Nov 10 1961, for $60,000 A.S.B. Penal also unsatisfied was a secured transaction filed by the First National Bank of Altoona dated June 2 1962 #14054 covering, past, present and future accounts receivables.

Public records show mortgage amounting $10,800 entered by First National Bank.

19 665 563 (18)

PLEASE NOTE WHETHER NAME, BUSINESS AND STREET ADDRESS CORRESPOND WITH YOUR INQUIRY.
The foregoing report is furnished, at your request, under your Subscription Contract, in STRICT CONFIDENCE, by DUN & BRADSTREET, Inc. as your agents and employees, for your exclusive use as an aid in determining the advisability of granting credit or insurance, and for no other purpose. DUN & BRADSTREET, Inc does not guarantee the correctness of the information contained herein and shall not be liable for any loss or injury caused by the neglect or other act or failure to act on the part of said company, its officers, agents or employees, in procuring, collecting or communicating said information
DBR-6 (9-61)

Exhibit 22

103a

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IN THE

Supreme Court of the United States

October Term, 1971

~~No. 206~~ 71-2061

DUN & BRADSTREET, INC.,

Petitioner,

vs.

C. R. GROVE, TRUSTEE, and ALTOONA CLAY PRODUCTS, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Counter-Statement of Question for Review

Where in a libel action the Court of Appeals entered judgment on the jury's verdict for Respondents for compensatory damages, designated as 'general' damages, and where the Petitioner asks this Court to review the decision of the Court of Appeals on a question which was not raised in the latter Court, namely, whether an award of general damages violated the constitutional rights of Petitioner, and where Petitioner does not aver that there is any conflict

of decisions on the question now raised by it, and Petitioners' sole basis for seeking certiorari is based on the argument that certain recent dissenting opinions filed in this Court were critical of the allowance of non-compensatory damages in libel cases, should this Court grant a petition for certiorari?

Counter-Statement of the Case

This trade libel action was brought by Respondents as result of an admittedly false credit report which was issued by Petitioner, a professional credit reporting agency, to suppliers upon whom Respondent Altoona depended for credit.

Altoona Clay Products, Inc. was incorporated in 1957. It sold brick and tile products to building contractors in central Pennsylvania, which products it purchased from about fifteen manufacturers whom it represented. Customarily the contractors paid Altoona when the buildings were completed. Because of Altoona's limited capital it was dependent upon credit supplied by the manufacturers (A. 90).

On January 9, 1963, Petitioner issued to Altoona's fifteen principle suppliers a credit report which stated that the court records in Blair County disclosed that a bank had entered a $60,000.00 judgment against Altoona (A. 23). The report set forth Altoona's financial condition and demonstrated that its assets exceeded its liabilities by $14,700.00 (A. 23). The $60,000.00 judgment would have rendered Altoona insolvent (A. 31). The report was issued in "strict confidence" (A. 103). Each subscriber had agreed that it would not reveal the report to the subject company or to anyone else (A. 84).

The $60,000.00 judgment referred to was actually not against Altoona but was against a wholly different corporation, Brick & Tile Sales Company. The debt upon which the judgment was entered had been incurred some years before Altoona was incorporated. In April 1963, the Petitioner admitted its error in a retraction report.

Upon receipt of the report, Altoona's suppliers, immediately restricted its credit, placed stringent time and amount restrictions on all future credit (A. 90), and some suppliers demanded immediate payment of all outstanding balances. Although 1963 was an excellent year for the brick and tile business in central Pennsylvania, the new credit restrictions imposed by Altoona's suppliers prevented it from even bidding on new work. As it entered the year 1963, Altoona's business prospects were unusually good. It had ten exclusive distributor franchises, favorable trucking contracts and fine business relations with both manufacturers and architects (R. 345, R. 378, R. 393). Its products were in demand (R. 339). The credit of Altoona was so badly shaken that Petitioner's retraction of the false report had no material effect (A. 91). By early 1964, the company was forced into the hands of a receiver for creditors (Mr. C. R. Grove) and its fixed assets were sold at a loss of $26,000.00 (A. 91).

The District Court submitted to the jury the question of whether, under the claim for general damages, Altoona had sustained a loss of trade and profits, damages to its business reputation and general harm naturally flowing from the publication of the credit report. At no time did Petitioner question the inclusion of these items as being proper for the jury to consider in connection with the claim for general damages (A. 92).

Brick & Tile Sales Company, whose name had prior to December 1952 been Altoona Clay Products Company, Inc. (Ext. 44, R. 147), had given a $60,000.00 mortgage bond on June 28, 1954 (Ext. 9, R. 109), three years before Respondent Altoona was incorporated. On November 10, 1961, judgment was confessed on this bond, according to documents on record in the Blair County Prothonotary's office (Ext. 12, R. 114). The mortgage had been entered of record in Blair County in June 1954 (Ext. 8, R. 101). Petitioner had issued a report on Brick & Tile Sales Co. notifying its subscribers of the judgment in December 1961 (Ext. 13, R. 115).

In June 1962, Petitioner had issued a credit report on Altoona in which it made no reference to the Brick & Tile Sales judgment (Ext. 20, R. 124). When Petitioner's representative made his check of court records in Blair County in January 1963, he took this previous report with him. It disclosed that Altoona was incorporated in 1957. The representative conducted a careless and slipshod investigation of court records. He checked only the judgment index and made no examination of the judgment docket, the records of the confession of judgment, the original instruments or the mortgage, all of which were available to him at the courthouse (R. 1276, 1277). The least examination of these dockets would have revealed that the $60,000.00 judgment was not against the Respondent Altoona.

The petitioner corporation was well acquainted with Altoona and its correct corporate name. Altoona had been one of its subscribers (R. 411) and Petitioner had, in fact, been engaged by Altoona to undertake collection of delinquent accounts (R. 647).

The jury returned a verdict in favor of Altoona for general damages in the sum of $110,000.00. The Court of Appeals ordered the entry of judgment upon this verdict (A. 93).

Argument

Petitioner has no basis for asking this Court to grant certiorari in order to review the decision of the Court of Appeals.

Although Petitioner has litigated this case for eight years, and there have been two reported decisions from the Court of Appeals and four from the District Court, and although Petitioner assigned thirty-three reasons and subreasons in support of its request for reargument in the Court of Appeals, in early 1971, it has never raised the argument, which it now advances, that the jury's award of general, and not special, damages deprived it of constitutional rights under the First and Fourteenth Amendments.

On the eve of the third trial, the District Court, acting *sua sponta*, ruled that the case of *New York Times v. Sullivan*, 376 U. S. 254; 84 Supreme Ct. 710 (1964), and cases decided thereunder, barred Respondents from recovering compensation in this libel case for damages which they sustained. The District Court erroneously ruled that the false credit report was a matter of public interest under *Rosenbloom v. Metromedia*, 415 F. 2d 892 (1969), and that Respondent's case failed because it had not proved that the report had been issued with malice.

The Court of Appeals pointed out that this credit report was issued by Petitioner in the course of its business, which was to distribute factual information to its limited group

of subscribers; that the report was issued in strict confidence; and that the subscriber who received it was not to disclose the contents either to the subject of the report or to anyone else. The Court ruled that neither the New York Times decision nor the Metromedia case were applicable.

The Petitioner apparently agrees with this decision of the Circuit Court, for it does not assert in its petition for certiorari that the New York Times rule is applicable or that Respondents were required to prove malice in order to recover damages.

Petitioner can not and does not urge that the decision of the Third Circuit is in conflict with the decision of any other court of appeals or with the decision of this Court. The issue now raised for the first time in the petition for certiorari was never advanced by Petitioner prior to this time.

The Court's Recent Decision in Rosenbloom v. Metromedia, Inc.

To support its argument that the rights of Petitioner under the First and Fourteenth Amendments were violated by the jury's award of general damages, the Petitioner allegedly relies on several opinions rendered by members of this Court in *Rosenbloom v. Metromedia*, 91 S. Ct. 1811 (1971).

Respondents submit that the issues determined in the Rosenbloom case do not remotely resemble the question which the Petitioner constructs in its petition.

Several preliminary facts are as follows:

1. The element of punitive damages is not involved in the present case. The trial court refused to admit any evidence on this claim or to submit it to the jury (A. 40).

2. The jury awarded the Respondents compensatory damages. The verdict was for 'general' and not for 'special' damages, although the evidence supporting the two elements was, according to the trial judge, substantially the same (A. 38). No complaint could be made that the award contained a duplication of damages.

3. In the Rosenbloom case an award was made for $25,000.00 in 'general' damages and $750,000.00 for punitive damages.

Petitioner states that a majority of the members of this Court expressed the view that the First Amendment precludes recovery in a libel case unless there is proof of special damages (Brief p. 12). A reading of the several opinions in Rosenbloom leaves Respondents without a clue as to the basis for Petitioner's statement.

Mr. Justice Brennan, speaking for three members of this Court, held that the rule in *New York Times v. Sullivan*, 376 U. S. 254 (1964), 84 Supreme Court 710, precludes a recovery in libel actions—absent malice—where the claim is based on news publications wherein the matter is of general or public interest, as well as in cases involving public officials and public figures.

As stated above, Petitioner is not pressing the argument that the New York Times rule has any application to the present case.

It is significant that Mr. Justice Brennan attached two pertinent footnotes in his Opinion—(1) that the Court is not intimating a view on the extent of constitutional pro-

tection of any purely commercial communication made in the course of business (n. 12, p. 1820) and (2) that the Court has not yet considered the impact of the First Amendment on the application of state laws to libels, wherein there is no issue of general or public interest (n. 17, p. 1822). In the present case, the defamatory publication was a purely commercial communication and the Court of Appeals ruled that there was no issue of general or public interest involved (A. 82).

The concurring opinions of Justices Black and White made no reference whatsoever to damage awards as factors in their dissents.

In Mr. Justice Harlan's dissent, he urged that in dealing with private libel the state should be permitted to set the applicable standard of care for publishers and that punitive damages should be recoverable by the victim of a wrongful publication if those damages bear reasonable relation to the compensatory damages awarded for actual harm to the plaintiff.

Justices Marshall and Stewart dissented, in the only opinion which made even indirect reference to the issue which Petitioner seeks to raise. They would impose no limitation on the recovery of actual damages, but would restrain 'punitive' and 'presumed' damages. Appropriate to the award in this case, their dissenting opinion states:

> "Of course, damages can be awarded for more than direct pecuniary loss but they must be related to some proven harm." (p. 1840)

General Damages

General damages are not punitive in nature but are compensatory. This had not been questioned by Petitioner during the years of litigation in this case until the filing of this petition for certiorari. The *Restatement of the Law of Torts*, Sec. 621, Comment (a), expresses this:

> "General damages are a form of compensatory damages. They are imposed for the purpose of compensating the plaintiff for the harm which the defamatory publication is proved, or, in the absence of proof, is assumed to have cause to his reputation."

See the District Court's instruction to the jury (A. 98).

At this time, Dun & Bradstreet does not deny that Respondents have a claim for damages against it for the false and defamatory credit report which it circulated among Respondents' suppliers. There is a long line of authorities supporting the right of such an injured person to recover general damages.

Montgomery v. Dennison, 363 Pa. 255 (1949);
Hartman Co. v. Hyman and Lieberman, 87 Pa. Super. 358 (1926), affirmed by the Pa. Supreme Ct. at 287 Pa. 78 (1926);
McIntyre v. Weinert, 195 Pa. 52 (1900);
Will (Trading as National News Co.) v. Press Publishing Co., 309 Pa. 539 (1932);
Hayes v. The Press Co., Ltd., 127 Pa. 642 (1889);
Maytag Co. v. Meadows Mfg. Co. (7 C. C. A.) 45 F. 2d 299 (1930);
Aetna Life Ins. Co. v. Mutual Benefit Health & Accident Ass'n (8 C. C. A.) 82 F. 2d 115 (1936).

See also: *Pennsylvania Statute of April 11, 1901*, P. L. 74, Sec. 3, 12 P. S. 1583.

Very pertinent to the damage award to injured Respondents in the present case is the rule which has been enunciated repeatedly by this Court that if a defendant's wrongful conduct has caused plaintiff damages which are difficult of exact determination, the plaintiff will not be required to prove his loss with exactness and precision. To hold otherwise, this Court said in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555 (1931), 51 S. Ct. 248, 250, would relieve the wrongdoer from damages "and throw the loss upon the injured party, (and) would be little less than legalized robbery."

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359; 47 Supreme Ct. 400;
Sheldon v. Metro-Goldwyn Pictures Corp., 304 U. S. 390; 60 Supreme Ct. 681.

For these reasons, Respondents respectfully urge this Court to refuse Dun & Bradstreet's petition for certiorari.

Respectfully submitted,

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August , 1971.